

152f
Thesaurus Juridicus:

CONTAINING

THE DECISIONS

OF

The several Courts of Equity,

UPON

THE SUITS THEREIN ADJUDGED,

AND OF THE

HIGH COURT OF PARLIAMENT,

UPON

PETITIONS AND APPEALS:

TO WHICH ARE ADDED,

The RESOLUTIONS of the BARONS of the EXCHEQUER
in Matters touching the REVENUES of the CROWN:

From the Period of the REVOLUTION to the End of
EASTER TERM 1798;

SYSTEMATICALLY DIGESTED.

By RICHARD WHALLEY BRIDGMAN, Esq.

VOL. II.

Æquitas est Corregio Legis generatim latæ quâ Parte deficit.

ARISTOT.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR E. AND R. BROOKE AND J. RIDER, BELL-YARD, TEMPLE-BAR;

1800.

5



ADVERTISEMENT.

MANY Professors of the Law having been pleased to express their Approbation of this Work, and their desire to render it as generally useful as possible, the Compiler will feel himself greatly obliged to any Gentleman who will kindly indulge him with a Manuscript Report of any adjudged Case, or with any Communication that may assist him in the Continuance of so elaborate an Undertaking; the Third Volume of which is preparing for the Press.

STRATFORD PLACE, LONDON,
20th October 1800.

ADVERTISING

Mary... of the...
to... of the...
to... of the...
to... of the...
to... of the...
to... of the...
to... of the...
to... of the...
to... of the...
to... of the...

...
...

CONTENTS

OF THE

SECOND VOLUME.

C—a

Casualty, page 1 to 2.

Charity and Charitable Uses, page 3—161.

- Sect. 1. OF charitable institutions, whether of royal or private foundation; and herein of the endowment, bye laws, domestic statutes, governors, visitors, and visitatorial power - - - Page 3
2. What is a good charitable use to be protected by the 43 *Eliz.* and what is a good devise or appointment thereto, notwithstanding the statute of mortmain; and where a defect in such devise or appointment shall or shall not be made good in equity - - - 24
3. Of such devises to charitable uses as are void by the statute of mortmain; and in what cases an endowment of money is considered so attached to the gift as to stand or fall with it - - - 44
4. Of such devises or appointments to charity as are good with respect to the gift, yet void as to the use, the same being either superstitious or such as the policy of the law will not admit; and herein of altering or diverting the same to other uses, and of the application of charity monies to purposes *ejusdem generis* - - - 72
5. In whom the nomination of objects shall rest where the description of the devisees or appointees of a charity is ambiguous, uncertain, or defective - - - 77
6. In what cases equity will control a devise to a charitable use or any eleemosynary appointment; how far the words of such a devise or appointment shall be construed to extend; and where the strict letter of the original gift is capable of mitigation or variation: and herein of the doctrine of *cy pres* - - - 84

- Sect. 7. What shall be construed a misemployment of lands, goods, or other effects appointed to charitable uses; what remedies may be had in such cases; and where the appointees, trustees, or governors are punishable for corruption or neglect - Page 126
8. To whom the surplus rents of lands devised to a charity or the increase of funds appropriated to charitable purposes, shall belong, and by whom they are payable 133
9. Of the commission and commissioners, their inquisition and decree; and herein of exceptions to such decree - 140
10. Of the order and priority which shall be observed with respect to charity legacies in the marshalling of assets 149
11. Of informations and other suits for charitable claims; who are the necessary parties; and what evidence is admissible in such cases - 155

C—a

GENERAL REFERENCES.

Canon Law, see Chivalry, Ecclesiastical Persons.
Caption of a Fine—Fine.
Catching Bargains—Deeds, Fraud, Heir, Usury.
Cautione Admittanda—Writ.
Caveat—Decree, Patent.
Chancellor—Equity.
Chancery—Equity, Jurisdiction.
Charters—Corporations, Patents.
Charter-Party—Trade.
Charge—Account, Rent-Charge.
Clandestine Mortgages—Mortgage.

C—c

GENERAL REFERENCES.

Certificate of a Bankrupt, see Bankrupt.
 ———— *of the Recorder*—London Customs.
 ———— *of the Judges*—Issue.
 ———— *of the Master*—Master in Chancery.
Certiorari—Bill, Writ.
Cessio bonorum—Bankrupt, Foreign Laws.
Cestui que Trust—Trust and Trustees.
Cestui que Vie—Copyhold, Estate, Landlord and Tenant.

Clerk

CONTENTS.

vii

Clerk in Court—Equity Officers.

— *Articled*—Master and Servant, Solicitor.

Creditor and Debtor—Debts Debtor and Creditor.

Creditors and Proof of Debts—Bankrupt.

C—i **Chibaltp**, page 161—164.

GENERAL REFERENCES.

Children, see *Bastard*, *Parent and Child*, *Portions*, *Posthumous*.

Christian Court, or *Spiritual Court*—*Ecclesiastical Persons and Things*, *Jurisdiction*.

Circumvention—*Deeds*, *Fraud*.

Client—*Solicitor and Client*.

C—o **Choses en Action**, page 164—166.

What is a *chose en action*, and how far the same can be assigned, released, or charged - - Page 164

Colonies, page 166—174.

Of the provincial laws and customs of the *British colonies* and of the jurisdiction of the king and council, and of the court of Chancery in matters respecting them; and herein of countries conquered by the king of *England* 166

Commission, page 174—181.

- Sect. 1. In what cases and for what purposes the court will grant a commission as a matter of right - 174
2. In what cases and for what purposes the court will grant a commission as a matter of discretion or favor - 175
3. Of commissions to ascertain the boundaries or value of landed estates - - 175
4. Of commissions of review, and the cases in which the Lord Chancellor will advise the crown to grant them 177
5. Of the execution and return of a commission - 179
6. Of the commissioners, their power and duty; and herein of their neglects and defaults - - 180

Condition, page 181—222.

	Rules respecting conditions	-	-	Page 181
Sect. 1.	Of conditions precedent	-	-	181
2.	Of conditions subsequent	-	-	187
3.	Of strict conditions and conditional limitations; who may take advantage of them, and who may be prejudiced thereby	-	-	190
4.	In what cases the court will require the performance of a condition either expressly or <i>cy pres</i> , what circumstances will induce the court to dispense with a condition, and what is such a performance of a condition as will protect against a forfeiture	-	-	205
5.	In what cases the court will relieve against a breach or non-performance of a condition precedent or subsequent, the matter resting in compensation	-	-	214
6.	Of void conditions	-	-	218

Consent, page 222—229.

Sect. 1.	How far a man shall be bound by his own consent or acquiescence confirmed (as it may be) by length of time, <i>et à contra</i> ; and herein of a consent not expressed but implied	-	-	222
2.	How far a man shall be bound by the consent of his counsel, solicitor, or agent	-	-	228

Consideration, page 229—238.

Sect. 1.	Of lawful and valid considerations against which equity will not relieve	-	-	229
2.	Of unlawful and invalid considerations against which equity will relieve	-	-	234
3.	In what cases a deed without consideration shall be deemed good and effectual, and to what purposes	-	-	238

Contempt, page 238—253.

Sect. 1.	What amounts to a contempt, and how the same shall be punished, and to what extent the estate or representatives of the party in contempt shall be bound	-	-	238
2.	Of the contempt of <i>meine</i> process <i>until decree</i> , and of the process for such contempt	-	-	247
3.	How the party in contempt shall clear himself of the offence	-	-	251

CONTENTS.

ix

Copyhold, page 253—330.

Rules as to copyholds	-	-	Page 253
Sect. 1. Of the power of the court of Chancery over copyhold estates and where relief has been given in cases of waste or forfeiture	-	-	255
2. Of the devise of a copyhold estate, (duly surrendered to the use of the will) where the same shall pass, though the will be not duly executed according to the statute of frauds and perjuries	-	-	259
3. Of the surrender and admission, and in what cases a defective surrender or the want of a surrender will be supplied in equity	-	-	261
4. By what words in a will a copyhold estate may be said to pass, the same having been previously surrendered, (or the want of such surrender supplied,) and who shall take the benefit of the surrender	-	-	285
5. How far copyhold estates are rendered liable to the payment of debts and legacies, and whether they shall be considered assets by descent in the hands of the heir	-	-	289
6. Of the estate of the lord, and of the cases in which the lord's superior estate shall protect the lesser estate of his tenant	-	-	294
7. Of the lord's court—Of fines levied and recoveries suffered, and other suits and proceedings therein, and also of barring estates tail by surrender	-	-	296
8. Of the fine to the lord—Of quit rents and yearly rents reserved	-	-	300
9. Of manerial customs; and herein of heriot customs	-	-	308
10. Of the acts of the steward, and in what cases the lord shall be bound thereby	-	-	315
11. Of the right of common; and herein of disputes or agreements between the lord and his tenants touching the same	-	-	316
12. Cases of contested rights between the lords of neighbouring manors	-	-	321
13. Of estates <i>pur autre vie</i> in copyhold lands, and how far <i>cestuy que vie</i> shall be considered a trustee for the first taker	-	-	323
14. Of the widow's free bench	-	-	325
15. Of the enfranchisement, merger, or extinction of a copyhold estate	-	-	328

Corporation, page 330—340.

Sect. 1. Of corporations ecclesiastical, civil, and eleemosynary in their aggregate capacity, and of the magistrates, members, and servants thereof individually	-	330
		Sect.

CONTENTS.

Sect. 2. Of the power of corporations aggregate; and herein of their bye laws	Page 334
3. Of sole-corporations	336
4. Of the power and duty of a corporation as trustees; and herein of their neglects, defaults and liability as well in their corporate as in their individual capacity	336
5. Of suits by and against corporations; and herein of informations in nature of <i>quo warranto</i>	337
6. In what cases the members of corporations aggregate shall be deemed competent witnesses; and herein of disfranchising a member for the benefit of his evidence	339

Costs, page 340—381.

Sect. 1. In what cases costs are allowed or refused by the court—Whose person or estate is liable to costs—How the parties entitled to costs shall obtain them, and what is the course of the court with respect to costs	340
2. Where costs are allowed as between party and party, and where as between solicitor and client; and herein of costs for part of a suit only	365
3. Where costs are awarded as a punishment in cases of fraud, vexation, neglect, or misbehaviour	366
4. Of the taxation of a solicitor's bill of costs	372
5. In what cases and in what manner security shall be given for costs	374
6. Where the claim for costs dies with the person, and in what cases there may be revivor for costs only	376
7. Cases of appeal for costs only	380
8. In what cases interest shall be allowed on costs	381

Court, Jungs of, page 381—383.

Of the internal and domestic jurisdiction of the benchers
and of the power of a court of equity over them 381

Covenant, page 383—410.

Sect. 1. Of covenants <i>real</i> which pass a real estate, run with the land, or are a lien upon it— <i>Personal</i> , as annexed to the person of the covenantor— <i>Inherent</i> , as tending to support the thing granted, or collateral to it— <i>Executed</i> , as to acts already done or cases in which a covenant shall be deemed satisfied or performed— <i>Executory</i> , as to do something <i>in futuro</i> —How created, on whom binding; who may take advantage of them, and of the relief in equity for a non-performance	383
2. What shall amount to a covenant to stand seised	405

Sect.

CONTENTS.

xi

Sect. 3. How far the covenantor shall be bound where he cove- nants for the acts of his ancestor, or of any other person	Page 406
4. Of general, implied, uncertain, defective, voluntary, or unlawful covenants	408

C—O

GENERAL REFERENCES.

- Coal Mine*, see *Mines*.
- Codicil*—*Will*.
- Collateral Evidence*—*Evidence*.
- College*—*Charity*, *Corporation*.
- Collieries*—*Mines*.
- Collusion*—*Deeds*, *Fraud*.
- Committee*—*Lunatic*.
- Commitment*—*Bankrupt*, *Contempt*.
- Common Recovery*—*Recovery*.
- *Tenancy in*—*Joint-tenant*, *Parceners*.
- *Seal*—*Corporation*.
- *Right of*—*Copyhold*.
- Company*—*Corporation*.
- Compos Mentis*—*Lunatic*, *Will*.
- Composition real*—*Tithe*.
- *of Debts*—*Debts*.
- Compulsion*—*Deeds*.
- Concealment*—*Deeds*, *Fraud*.
- Conclusion*—*Estoppel*.
- Condemnation of Goods after Seizure*—*Revenue*.
- Conjunctive and Disjunctive*—*Words*.
- Conquered Countries*—*Colonies*.
- Consanguinity*—*Distribution, under tit. Executors, and Administrators, Heir*.
- Construction*—*Deeds*, *Words*.
- Contraband Goods*—*Revenue*.
- Contracts*—*Agreement*, *Trade*, *Usury*.
- Contingent Remainders*—*Devise*, *Estate*, *Remainder*.

- Contingent Debts*—Bankrupt.
 ——— *Interest*—Devise, Estate on Contingency,
 Remainder.
Contribution—Average, Debts, Legacy, Proportion.
Conversion—Devastavit, under tit. Executors and Ad-
 ministrators, Trover.
Conveyance—Deeds, Release.
Co-Obligors—Bond, Surety.
Co-Parceners—Gavelkind, Joint-tenant, Parceners,
 Partition.
Copyright—Literary Property.
Counsellor—Equity Officers.
County Palatine—Palatine County.
Court of Chancery—Equity.
 ——— *of Exchequer*—Equity.
 ——— *Inferior*—Inferior Court.
 ——— *Spiritual or Christian*—Ecclesiastical Persons and
 Things.
 ——— *Foreign*—Foreign Courts.
 ——— *of Stanneries*—Stanneries.
 ——— *of Orphans*—London Customs.
 ——— *of Chivalry*—Chivalry.
Courts—Jurisdiction.
Coverture—Baron and Feme.
Covin, Deeds, Fraud.
Cross Bills—Bill.
 ——— *Examination*—Evidence.
Crown—Prerogative, Revenue.

C—u

Curtesy, page 412—422.

Of the requisites to give an estate by the curtesy—Of the
 condition and power of the tenant; to what charges,
 incumbrances, or forfeitures he shall be subject; and
 how far favored in equity

Page 412

GENERAL

CONTENTS.

iii

GENERAL REFERENCES.

- Custom*, see Prescription, Time.
- Customs*, Duty of—Revenue.
 - *Manerial*, Copyhold.
 - *Local*—Local Laws and Customs.
 - *Foreign*—Foreign Laws and Customs.
 - *of Merchants*—Trade.
 - *of London*—London.
 - *of York*—York.
- Church*—Ecclesiastical Persons and Things.
 - *Wardens*—Parish.
- Club*—Society.
- Curacy and Curate*—Ecclesiastical Persons and Things.

D—c Debts, Debtor and Creditor, page 422—475.

- Sect. 1. How far creditors are favored in equity, and what conveyance, assignment, or other disposition of property shall be deemed fraudulent as against them - Page 422
- 2. Of deeds of trust for payment of debts—What debts shall come within the provision of such deeds, and of the precedence which one debt shall have over another in equity - 453
- 3. Of the composition of debts by deed of trust or letter of licence; and herein of private and underhand engagements or partial payments in frauds of such deeds - 462
- 4. In what cases one debt shall be allowed to be set off against another in equity - 466
- 5. Where debts of a different nature are due and a general payment is made, to which debt such payment shall be applied - 472

Decree, page 475—509.

- Sect. 1. Of drawing up, signing, entering, and inrolling a decree; and herein of caveats to prevent the same - 475
- 2. Of the force and effect of a decree, who are entitled to it or are bound by it, and from what time - 480
- 3. Who may appeal from a decree and in what cases - 492
- 4. Of opening, reviewing, and reversing a decree, for what causes, and in what cases - 494

VOL. II.

b

Sect.

CONTENTS.

Sect. 5. Of reviving a decree	-	-	Page 502
6. Of the performance and execution of a decree; of the disobedience and contempt thereof; how far such a contempt shall be cleared; and how far the estate or representatives of a person in contempt shall be bound			504

Deeds, page 509—586.

Rules respecting deeds	-	-	509
Sect. 1. Of the construction and operation of deeds, conveyances, and assurances			513
2. Of voluntary deeds, and where a defect therein shall be supplied in equity			545
3. Of deeds obtained by fraud or duress, circumvention or misrepresentation, or from parties not constant of their right			552
4. Of deeds lost, concealed, suppressed, cancelled, or destroyed			567
5. In what cases the court will order deeds to be delivered up or brought into court for inspection			581

Demise Le Roy, page 587—588.

Maxims and Rules	-	-	587
How far the demise of the crown shall affect the ordinary process of the court			587

THESAURUS JURIDICUS.

Casualty.

1. *A.* Covenanted to convey his estate for two lives in a church-lease to *B.* by a certain day. After the articles and before the appointed day one life dropt. Decreed the purchaser to bear the loss, in regard there was no default in the seller (*a*). But Lord Keeper said, it might have been otherwise if both lives had dropt, for then no estate would have been left to convey (*b*).

(*b*) Mr. Cox, the editor of P. W.'s Reports, says, *Quare tamen* the reason of the distinction between the loss of a part and of the whole, *et vide* *Cass v. Rudele*, 2 Vern. 280. (*c*). *Vide etiam* *Mortimer v. Capper*, 1 Bro. Ch. Rep. 156. *et* *Pope v. Roots*, 7 Bro. P. C. 184.

(*c*) In *Pope v. Roots*, Lord Apsley said, the case of *Cass v. Rudele* was wholly misrepresented by *Vernon*; but his Lordship there states the case from the printed cases in the House of Lords.

2. The court of Chancery will not grant a perpetual injunction unless there be some ingredient in the cause to give the court jurisdiction, as accident, fraud, trust, &c. But in the principal case, upon an appeal to the Lords, a perpetual injunction was granted upon circumstances of particular vexation.

3. It has been the constant rule of courts of equity in *Ireland*, that where by reason of a general and national calamity nothing is made out of which lands are a fund for the payment of interest, no interest ought to run during the continuance of such public calamity; and agreeable to such rule, the House of Peers in *England*, upon appeal from the court of Exchequer in *Ireland*, ordered just allowances to be made in taking the accounts in this case.

4. Where a former will of land is cancelled by the testator, upon a presumption that a latter will is good and duly executed, which proves not to be so, equity will relieve under the head of accident,

VOL. II.

B

and

M. 1702, cor. Wright, C. S. *White v. Nutt*, 1 P. Wms. 612.

2 *Eq. Abr.* 687. pl. 3.

(*a*) Lord W. compared this to the case of a reversioner, who had articed to sell his reversion expectant on two lives, where, if one of them had died before the conveyance, the purchaser would have had the benefit of it; and his Lordship said, the estate should

be considered as conveyed from the time the articles were sealed.

T. 1706, cor. Cowper, C. S.

Lord Bath v. Sherwin,

Proc. in Ch. 261.

25 June 1715, Dom. Proc.

Basil v. Atcheson,

14 *Vin. Abr.* 457. pl. 7.

2 *Eq. Abr.* 529. pl. 3.

1 Bro. P. C. 529.

H. 1716, cor. Cowper, C.

Onions v. Tyrer, 1 P. Wms. 346.

2 Vern. 741. *Proc. in Ch.* 459.

Gilb. Eq. Rep. 130. *nomine*

Anyons v. Fryer, 10 Mod. 467.

1 *Eq. Abr.* 409. pl. 1.
Vide 3 *Mod.* 258. 1 *Show.* 89.
Swinb. 533.

and injoin the heir in favour of the first devisee who shall hold and enjoy.

4 *Mar.* 1723, *Dom. Proc.*
Sweet v. Anderson,
 2 *Bro. P. C.* 430.
 5 *Vin. Abr.* 93. c. 15.
 13 *Vin. Abr.* 458. c. 6.
 19 *Vin. Abr.* 514. c. 37.
 2 *Eq. Abr.* 211. c. 5.

5. Equity will not relieve against the breach of a condition *precedent*, where the damages accrued are contingent, and cannot be estimated; but it is the proper business of courts of equity to relieve against accidents.

14 *Jan.* 1739, *cor. Hardw. C.*
Graydon v. Hicki, and Graydon v.
Graydon, 2 *Atk.* 18.
 (a) *Vide* *Peyton v. Bury*,
 2 *P. Wms.* 626. *Jones v. Suffolk*,
 1 *Bro. Ch. Ca.* 529. *Vide*
 also the note at the end of the
 case of *Hervey v. Aston*, 1 *Atk.*
 361. 3d edit.

6. It is the constant rule of law in the case of conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void (a); for in *Co. Lit.* 206. it is laid down, that in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute.

18 *July* 1739, *cor. Hardw. C.*
Whitton v. Russell, 1 *Atk.* 449.

7. Although equity will relieve against accident or fraud, it will not relieve against accidents which prevent voluntary dispositions of estates.

21 *April* 1743, *cor. Hardw. C.*
Marchioness of Blandford v.
Duchess Dowager of Marlborough,
 2 *Atk.* 544.

8. If by any accident after the execution of a power, there is an excess in the lands settled on the jointress, she shall have the benefit: by parity of reason, if there is a deficiency by inundation or casualty, she must acquiesce under it; to construe it otherwise, would be to make such powers defultory.

As to bonds or deeds lost, cancelled, or destroyed, see *Bonds, Deeds*.

As to casualties by fire, tempest, &c. see *Landlord and Tenant*.

Charity and Charitable Uses.

C—a

SEC. I. Of Charitable Institutions, whether of Royal or private Foundation: And herein of the Endowment, Bye-Laws, Domestic Statutes, Governors, Visitors, and Visitatorial Power.

1. THE free grammar-school of *B.* was founded by King *Ed. 6.* who endowed it, and by patent appointed perpetual governors, who were to make laws and ordinances, but no express visitor was appointed by the patent. The legal estate of the endowment was vested in the governors.

A commission issued under the great seal to inspect the conduct of the governors; to which it was objected, (and insisted on the authority of 10 Co. 31.(a),) that the crown had no power to issue such a commission, the royal founder by his appointment of governors having made them visitors by implication. On this question, the court now delivered their opinion *seriatim*.

1st, It is a rule, that where the king is founder, his royal successors are visitors; but where a private person is founder, his heirs are visitors by implication of law.

2^{dly}, Though this visitatorial power resulted to the founder and his heirs, yet the founder might vest such visitatorial right in any other person or his heirs.

3^{dly}, It would be unreasonable and mischievous, that where governors are appointed they should be visitors by construction, and be exempt from being visited by others. *Ergo*,

4^{thly}, In those cases where governors or visitors are said *not to be accountable*, it must be intended where such have the power of government only, and not where they have the legal (b) estate, and are intrusted with the rents and profits: such a privilege would be a temptation to a misemployment and breach of trust.

H. 1725, cor. King, C.
Eyre, C. J. et Gilbert, C. B. assist.
Eden v. Foster, called the case of
Birmingham School,
2 P. Wms. 325.
Gilb. Eq. Rep. 178.
Sel. Ca. in Ch. 36.
2 Eq. Abr. 199. pl. 5. 751. pl. 1.

(a) Case of Sutton's Hospital
or Charterhouse.

Note; The founder during his
life is always visitor.

(b) *Vide* Duke's Ch. Uses,
62, 69.

Charity and Charitable Uses. § 1.

5thly, The word *governor* does not of itself imply *visitor*: such a strained construction would prejudice the charity; and besides, it would make the king's charter operate to a double intent, which ought not to be.

6thly, A power may be given to commissioners to make bye-laws for the regulation of the charity, but where the power so given is too extensive, it will be void only *pro tanto*.

Resolved, that the commission under the great seal was well issued in this case.

6 Dec. 1740, cor. Hardw. C.
Attorney-General v. Pearce,
2 Atk. 87. Barnard. 288.

2. Several charities of a public nature were given under the will of Mrs. S., afterwards her executrix Mrs. N. by her own will gave 100*l.* to each of the public charities which Mrs. S. had mentioned in her will. The distinction attempted for the defendant was, that Mrs. N. meant by the word *public* in her will to distinguish them from private charities. Lord Chancellor thought the word *public* was meant only by way of description of the nature of the charities, and not by way of distinguishing one charity from another, for it would be almost impossible to say which were public and which were private in their nature. The charter of the crown does not make a charity more or less public but only more permanent. It is the extensiveness of the will which constitutes a public charity. A devise to the poor of a parish is public. Where testators have not any person in contemplation, but leave the choice of objects in the discretion of trustees, though the person be private, the charities may be called public from the extensiveness of their benefit. A sum of money to be disposed of by A. and his executors at their discretion, among poor housekeepers, is of this kind.

21 July 1744, cor. Hardw. C.
Attorney-General v. Price, case of
Berkhamstead School, 3 Atk. 108.

3. An information was brought relating to the school of B., a charity founded by act of parliament 2 & 3 Ed. 6. *Per* Lord Chancellor—Though the court of Chancery has a general jurisdiction over charities, by issuing a commission, and can likewise give directions for the management of a charity, yet this does not extend to such where local visitors are appointed, for if there is a private visitor, then he and his heirs have a right.

If there is a public endowment by the crown, then a commission may issue from Chancery to inspect the charity, and the application of the money.

But

Vide Eden v. Foster,
2 P. Wms. 325.

But if by letters patent or an act of parliament a local visitor is appointed, Chancery cannot interfere.

Local visitors do not visit but from three years to three years, yet if they please they may hear complaints within that time.

It was said in this case, that if a visitor's reward is too small, the court has power to augment it.

Note. In this case Lord Hardwicke expressed his opinion to be, that sending children of a lower sort to a Latin school was giving them a wrong turn, inasmuch as it took off their inclination to husbandry and trade, which is more suitable to their degree in the world. His Lordship made the same observation in *Attorney-General v. Middleton*, 2 Ves 328.

Note. In this case Lord Hardwicke expressed his opinion to be, that sending children of a lower sort to a Latin school was giving them a wrong turn, inasmuch as it took off their inclination to husbandry and trade, which is more suitable to their degree in the world. His Lordship made the same observation in *Attorney-General v. Middleton*, 2 Ves 328.

4. A petition in this case was presented by the Attorney-General at the relation of Gray and others on behalf of the charity founded by Sir John Morden v. Sir John Lock and the rest of the trustees. The substance of the petition is not stated, but the cause of complaint appears to be the amotion of some of the pensioners.

26 July 1744, cor. Hardw. C. *Attorney-General v. Sir John Lock and others*, case of Morden College on Blackheath, 3 Atk. 164.

Lord Hardwicke said, the question was, Whether he should be warranted on such an application as the present to take a previous step to restore the pensioners to their places in the college. It was incumbent on the court to support the charity, and to maintain and guard the power of those who have authority from the donor, for it would be of bad consequence if their authority was upon every instance enervated and broke into. If the same niceties were observed upon the amotion of a pensioner from an hospital, as where a man were turned out of his freehold, no man of fortune or ability would undertake the trust. Sir John Morden had not left the power of visitation to his heir, but had made a perfect constitution of his charity. The trustees had authority to place and displace the chaplain, treasurer, and other officers and merchants, &c. at pleasure; to make bye-laws and rules for regulating the charity and governing the house, which was a very general power. The donor directed the governors and visitors to visit the college once a-year or oftener, and then to inspect the treasurer's accounts, to examine into the behaviour of the chaplain, and to displace them if they had acted dishonestly or improperly, and likewise to remove any merchant, immoral or guilty of drunkenness, &c. Lord H. agreed, that where there are governors who are visitors also, they are accountable to the court of Chancery *quoad* the estates of the charity (a). In this case the trustees' authority was two-fold, first, as to the management

(a) *Sutton v. Colefield*, Duke's Char. Uses, 68, 69.

(a) Attorney-General v. Price,
3 Atk. 108.

of the estate and revenue, and secondly, as to the government of the house. In the latter, the trustees were absolute, and the court could not interpose (a). As to the question, Whether the trustees had an arbitrary power to remove at pleasure, Lord H. would give no absolute opinion, but his lordship inclined to think they had such a power without hearing or giving any reason for so doing. Lord H. then proceeded to assign his reasons founded upon the domestic ordinances of the college, and as to the merchants his lordship observed, that if they were guilty of drunkenness or any debauchery, then the trustees *shall and may* by writing under hand and seal turn them out. The words *shall and may* Lord H. said, in general acts of parliament or in private constitutions, were to be construed imperatively; they *must* remove them. Upon the whole point, Lord Chancellor was of opinion there was a general power of amotion, the founder having laid an obligation on the trustees to turn out for the *majora crimina*. Lord H. felt a great difficulty in this case, from the danger of making a precedent to restore a mere pensioner of an hospital on his own application. If such inquiries were encouraged there would be no end to them, they would tend to overturn such charities absolutely. In the case of a school, the court would not on motion either turn out or restore the master without hearing the cause, neither would the court of B. R. on a *mandamus* restore any man to an office in a summary way without hearing the merits of the case. His lordship said, it would be less prejudicial to the foundation that one pensioner should be turned out wrongfully, than that the governors should be perpetually liable to have every action of theirs examined into. Lord H. recommended it to Sir John Lock to allow something to the pensioners to keep them from starving, but his lordship would not make any order for it.

Note; Defendants obtained from the Rolls a month's time to plead, answer, &c.; and it was ordered that in the mean time all process of contempt be stayed.

11 Dec. 1744, cor. Hardw. C.
Attorney-General v. Balcol College,
9 Mod. 407.

5. Bill against the trustees of Mr. Snell's charity, praying an account of the funds, and that a certain lease of the charity estate, under which it had been much improved, might be set aside, or at least the renewals

renewals of it; and that the court would direct the manner in which the objects of the charity should be subsequently pursued: but the court refused setting aside the lease without making satisfaction to the lessee, according to the value of the lease, and of the improvements made on the charity estate; and directed an inquiry before the Master as to the lasting improvements and money laid out, and how much the annual value of the charity had been increased by the lessees; and also what was the real value of the lease when first granted to be then purchased, consideration being had to the continuance and renewals; by which it would appear whether the lessees had had sufficient satisfaction or not; for the court would take care that they have justice done them.

The best way to regulate charities, is to have schemes laid before the Master.

If a lease or grant is good at law, equity will not set it aside without allowing for lasting improvements.

6. On the foundation of a charity school, the wardens of — were by the statutes to nominate a Master within 60 days after an avoidance. Upon their default, the dean and chapter of York were to do it within 30 days, and then it devolved to the bishop. Defendants nominated R., who not being in priest's orders as the statutes required, the bishop taking it to be a lapse sent notice of the avoidance to the chapter, who not nominating, the bishop after 30 days nominated C., who afterwards resigned into the hands of the wardens and every other person having power to accept it. In five days defendants again nominated R., who was then in priest's orders. To this nomination several objections were taken. *Per Lord Chancellor*—In these cases where no person has made out a title, the court having power to regulate charities, often gives direction to proceed to a new election according to the statutes. It depends in this case upon the right of R., which if good is an answer to the relief prayed. The only objection to the first nomination of R. is his not being in priest's orders, which on the constitution of the statutes cannot be dispensed with by the court. If it depended on that alone, his lordship said he should doubt whether to be in priest's orders should be strictly taken according to the canon law, or agreeable to

26 Jan. 1747, cor. Hardw. C.
Attorney-General v. Wycliffe,
1 Ves. 80.

(a) *Vide* 1 Inst. 95. b.

common parlance; but the subsequent statutes shew, that *such orders were meant* as capacitated the person to celebrate mass, which is a decisive construction on the words of the former statute, for since the reformation, a charitable foundation for saying mass or praying for souls, is adjudged to be performed by saying the service according to the liturgy (a). The second nomination was valid, and was good upon the resignation of C. The objection was, that the wardens could not nominate R. a second time as upon the first avoidance, because the 60 days given by the founder were expired, and there was a devolution to the bishop; but his lordship thought this not like a lapse, for a person in the second instance is as much a patron for that time as in the first, therefore it is not within the reason of a lapse, which is, that the cure of souls may not be neglected. An objection to the warden's right to present was taken from the want of sufficient notice to the chapter: though the bishop was misled in giving the notice, and should if properly advised have gone further, and sent them also a copy of the statutes, yet his lordship said he was not strictly bound thereto in point of law, for he was to presume that they equally knew the statutes. Notice must be given of the fact, but not of the foundation of a right which they were to inquire into, as upon notice of an avoidance the patron is to look into all the consequences of it. As to the objection, that the bishop's turn was never really served, a comparison was made to the case of a presentation to a living and a lapse, and that where the presentee of the king dies before induction, or the presentee of a common person before institution, they shall present again, which is true, because it is the same original act; but the analogy of those cases cannot be carried to cases where there are not the like requisites, and C.'s being in actual possession is not material, for he might maintain an ejectment for the lands, if any, and recover them, which shews he was master. It was objected also that he was not master, because he had not taken the oath, but the statutes import that he was first to take the office, being only directory, and not a condition precedent as to the oath. The remedy for his not taking it was, that the wardens might have turned him out; in this respect he is not to be compared to officers of corporations, all the charters being different from this. Then the resigning is a strong evidence of his accepting the office.

office. The proceeding to a new nomination was regular, and within 60 days, and what weighed with the Lord Chancellor was, that the resignation was to quiet the matter; and for this further reason his lordship said it was not like a presentation, because the bishop could not revoke it, which the king before induction; or a subject before institution, might do.

The defendant having a right, and no objection being made to his character, and the relator having no right, Lord Chancellor dismissed the bill with costs.

7. Lady Clare, the foundress of Clare-Hall College in Cambridge, (regn. Ed. 3.) appointed the Chancellor to visit it in exclusion of her heir, *et si quid repererit corrigendum*, to amend it, and to determine doubts and construe the statutes. In 1615 John Freeman esq. directed 2000*l.* to be laid out in land, and the rents to be employed in the maintenance of ten poor scholars, two of whom to be Fellows of Clare-Hall. For the first 100 years the intention of J. F. the donor was not once deviated from, but in 1726 a fellow was elected contrary to the donor's will, and the same innovation was continued in every election for 20 years. In 1743 the relator, a bachelor of arts, offered himself a candidate for a vacant fellowship, being qualified in all respects by the terms of the will of J. F., but the master and fellows elected the defendant, who was in nowise qualified under the restrictions of the latter foundation. The relator therefore preferred his bill, praying that the propriety of the foundation under the will of J. F. might be asserted and established. Defendant pleaded the original foundation and endowment of Lady Clare, and the letters patent of K. Ed. 3. and that the relator did not appeal to the Chancellor as visitor of the college, who had power to hear and determine the right of election. *Per Lord Hardwicke*—It appears very clearly, that there is a general visitor of Clare-Hall College under the original statutes of Lady Clare, who instead of creating a visitor by general words, has directed that the Chancellor should visit the college once a-year. No particular words are required in a donation to a college to create a visitor; it is sufficient if the intention of the founder appears, and technical words are not necessary. *Si quid corrigendum*, &c. makes the Chancellor

21 Mar. 1747, cor. Hardw. C.
Attorney-General v. Talbot, case
of Clare-Hall, Cambridge,
3 Atk. 674. 1 Ves. 78.

Charity and Charitable Uses. § 1.

Chancellor a general visitor, and if he finds a person taking part of the revenues improperly, he may under that power remove him. Besides, the foundress directs, that in case of doubt *the Chancellor shall construe the statutes*, and she expressly excludes her own heir; than which nothing can be stronger. The Chancellor is *clearly visitor* of the college. If then the Chancellor is visitor, no court of law or equity can anticipate his judgment, or take away his jurisdiction: his determination is final and conclusive. The visitatorial determination is *forum domesticum*, adjudged in a summary way *secundum arbitrium boni viri*, and if discreetly exercised and not abused, is more convenient and less expensive than any suit at law or in equity.

The second point is, Whether this visitatorial power created by Lady *Clare* extends to the charity afterwards founded by *J. F.*?

It was contended, that the new-elected fellows could not be incorporated with the old fellows, and that the former were not liable to the same rules or to be governed by the same visitor as Lady *Clare's* foundation; and that as *J. F.* had not by his donation made his fellows members of the original corporation, that corporation cannot extend itself or its statutes. *Sed per Lord Hardwicke*—If *K. Ed. 3.* had made the original corporation to consist of 12 fellows, the new fellows could not have come in without a new incorporation; but in the present case the number is indefinite, and where the number is indefinite, a lay corporation may incorporate new members, if they do not abuse their power. If then the new fellows may be ingrafted into the college in question, they become members, and must be governed by the statutes and discipline of the original foundation; and if they are liable to it with regard to amotion, they are equally so with regard to election. A visitor is a much more proper judge of the comparative fitness and qualification of candidates than a court of law or equity, being more conversant in matters of that nature. Lord *H.* further thought, that the relator had excluded himself from entering into the principal question, by praying expressly to be admitted a fellow of *Clare-Hall*, and there was no averment that the new fellows were not part of the corporation, or that they might not enjoy any office under the original foundation. But, said Lord *H.*, though the plea be allowed, the parties may descend

§ 1. *Endowment, Bye-Laws, Visitation Power.* C—a 11

scend to proof, and if the relator can shew that the new fellows are merely nominal, it will be a different consideration. Lord H. was strongly induced to hold against the information, by the relator's prayer that defendant may account for the profits of the fellowship during his possession. It would be absurd to make a poor fellow account for commons, &c. which he may have eat, upon an imagination that he had a right to them. Lord H. further said, an information in the present case was improper, and that an application should have been made to a court of law for a *mandamus* to determine the particular rights of the parties, for the charity is sufficiently established: a court of law had the proper jurisdiction: and though it is said, *boni judicis est jurisdictionem ampliari*, yet Lord H. discouraged controversies of this kind in seminaries of learning.

Plea allowed, and the relator not precluded from shewing by other statutes, that the new fellowships were not liable to the general visitatorial power under the original foundation.

8. The rule, that an information for a charity is not to be dismissed, but that there must be a decree for the establishment of it, holds only in cases of private charities, and does not extend to those founded by the crown; for where there is a foundation for a perpetual charity by the crown, it is established as well as it can be, by a higher authority than that of the court of Chancery.

9. Bill against *St. John's College in Cambridge* to oblige defendant *Dr. Rutherford* to deliver up a presentation made by the college to him to the rectory of *B.*, to restrain his institution and induction, and to present the plaintiff under their common seal. The bill set forth, that the Countess of *Richmond*, mother of King *Hen. 7.* founded the college: that *Queen Eliz.* in her 22d year gave a new body of statutes to the college, which they accepted, and under which they had ever since been governed: that by ancient usage, whenever a benefice became vacant, the senior fellow in the divinity line was presented, whether he had taken the degree or not: that *Dr. B.* by will in 1689 decreed to the college the rectory in question, in trust, to present his nephew, if capable, on the first avoidance, and on the next, one of his name and kindred, (being capable and in the college,) and if

In *Green and Rutherford*,
1 Ves. 475. Lord H. said he had gone further in this case than Lord Holt did in 3 Mod. 421.

4 Mar. 1748, cor. Hardw. C.
Attorney-General v. Smart,
1 Ves. 72.
Vide *Attorney-General v. Scott*,
1 Ves. 413.

23 Mar. 1750, cor. Hardw. C.
M. R. assist.
Green v. Rutherford,
1 Ves. 462 to 475.

no such, then the senior fellow, being a divine, and if he refused, the next senior divine, and so downward; and if all refused, then as they should think fit; but whomsoever accepted the living, should vacate his fellowship within one year. The last incumbent died in *May 1749*, and plaintiff was the next senior fellow in rotation, who accepted the benefice upon the refusal of others; but defendant insisted, that he being D. D. was to be considered as the person described by the testator, and interposed by appeal to the Bishop of *Ely* as visitor. On hearing this appeal, the bishop was of opinion that Dr. *Rutherford* the defendant was within the description of the will, and therefore required the college to present him, and that they, to avoid being censured, made a special presentation under their common seal, but plaintiff insisted, that as the advowson was devised to the college under particular trusts by a third person, not the founder, the visitor had no jurisdiction to determine of the presentation, or to interpose in execution of the trust, and therefore he prayed that the presentation might be cancelled, and that the college might be directed to present him, as entitled under the trusts of the will. Defendant pleaded to the jurisdiction of this court, and insisted on the will and statutes which he set forth *verbatim*. The court, having taken time to consider of this case, then gave judgment. *Per M. R.*—The opinion of the court must be grounded on the pleadings in this case, without regard to the arguments on either side. His Honor confined himself to the merits of the defendant's plea on the general question, and was of opinion it ought to be over-ruled. It was contended by the defendant, that if the living in question falls not within the consuance of the visitor, all livings given or purchased subsequent to the first foundation of the college, and by a private person, and even a bequest of books, &c. would be exempted from the visitor's power. But his Honor said, this was not a purchase or general bequest of an advowson without any particular trust annexed, for then though it came after appointment of visitor, and from a third person, or by purchase, it would fall under the general regulations controlling all property of that nature, and be equally the object of visitatorial power as the former was; but this is circumscribed by express trust, inconsistent with the regulations by which other property is to be governed,

governed, and is therefore proper for the jurisdiction of this court. The merits of the controversy depend on the construction of the will, and the execution of the particular trusts therein, both of which are proper for this jurisdiction. It makes no difference that a collegiate body are the trustees, for they are as much bound and compellable to execute the trusts as a private person. Though the founder has given a visitor, to superintend her own foundation and bounty, yet as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute the trust under the direction of the court. They were compellable also in the same manner to execute the next trust in the will to one of the testator's name and kin. If a bill had been recently brought against the heir, it must have been first to have the will declared well proved and established against him, and next to have the direction of the court for carrying the trusts of the will into execution. Had this trust for the senior divine so come under consideration, the court would have declared who came under that description, and if the college had afterwards declared a contradictory trust, the court would not have endured it, but would have relieved the injured party. If this would have been done on a recent application, the reason of the case is not altered by deferring the application till the directions of the court were wanted. This case is grounded on the special trusts of the will, in which the visitor has no power to interpose. His Honor said, such would be his opinion even if the statutes were consistent with the will; but upon comparing them they are inconsistent, and if the visitor was to judge by the statutes, (which is a visitor's rule,) he would act contrary to the intent of the testator, and defeat the will. The members are sworn to obey the statutes on pain of amotion, but if an advowson is accepted by them on other terms, that cannot be within the compass of the oath to the founder, otherwise no man can be the regulator of his own gift where there is a visitor. Subsequent donations may certainly be put under the same visitatorial power as the founders, but then the subsequent donor is considered as a co-founder and appointer of the visitor: but in this case the testator is founder; the rules in his will are his statutes; he did not make the bishop his visitor, nor did

(a) A party may pray a prohibition against his own suit. 2 Roll. Abr. 312. pl. 14.

did he exclude this court from its jurisdiction. The right of the visitor is said to be submitted to by the appeal; that admission cannot give the visitor a right he has not, nor take away the ordinary jurisdiction of the court, or bind the parties (a). His Honor could not see the visitor had any power to compel the presentee to resign at the end of the year, as the will required; he had no jurisdiction as to breaches of the will, but this court has, and the non-performance of the decrees of this court is a contempt. This is a question of mere property, Who ought to have this living under the special trusts of the will? His Honor could not say (and yet if the plea were allowed he must say) the plaintiff is not entitled to the opinion of this court on the trust in a question of this nature, or may go higher on any mistake, and not be finally concluded by any single opinion.

Lord Chancellor entirely concurred with his Honor on the main question and in his manner of treating it. The only question to be determined is, whether the plea is sufficient in law and equity to oust this court of all jurisdiction in this case? Two points were made: 1st, Whether it is sufficiently shewn that the bishop is general visitor of the college? 2dly, If so, whether the presentation under the will admitted by the plea is a proper subject of the visitatorial power? A third point was attempted, That the appeal to the visitor was an admission of his jurisdiction; but his lordship said, no appearance or answer can give a jurisdiction to a limited court, for a prohibition may be granted even against a party's own suit; and the same rule holds in a collateral suit. As to the first point it is not necessary or proper to determine whether all the statutes are set forth in the plea; but on so much as is set forth his lordship said the bishop is general visitor, but by the statutes he is prohibited to give new statutes or put in execution those of any other; if he does, the college is absolved from obedience. Queen Elizabeth has reserved the power of adding, &c. and hence arises the difficulty, as a case may happen in which the Master, &c. may be subject to be removed by a power different from the bishop, and that even for obeying the bishop's sentence; and how then can the bishop be said to be general visitor? But his lordship was satisfied that the bishop is general visitor till such a case happens. The court of

King's

King's Bench has held that visitatorial powers may be suspended and may revive without inconvenience (b), and that during the cesser the jurisdiction would devolve on the king's courts. So in the present case, where the power of legislation is reserved to the crown. On the second and main point, on the merits of the plea, Lord Chancellor agreed that the presentation is not a proper subject of visitatorial power. To argue this clearly, the origin and nature of visitatorial power must be considered. The origin of all such power is the property of the donor, and his right (c) to dispose, direct, and regulate it (d), like the case of patronage; and if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it (e), the law allows the founder or his heirs or appointee to be visitor, and determine concerning his own creation. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power, from which it appears the nature of this power is *forum domesticum*, the private jurisdiction of the founder, and cannot extend further, unless some person grafts upon it, and by express words or necessary implication subjects his donation to the same visitatorial power, and to be governed by the same rules, and then the former visitor is as created by that subsequent founder or donor (f). The founder may give a general power or may bind by particular statutes and laws, may give the visitor power of altering or making new statutes, or may restrain from doing it or from acting according to any other, as in the present case. If the power of the visitor is unlimited and universal, he has, in respect of the foundation and property moving from the founders, no rule but his sound *discretion* (g). If there are particular statutes, they are his rule; he is bound by them; and if he acts contrary to or exceeds them, he acts without jurisdiction and his act is a nullity. To apply this general reasoning Lord Chancellor laid down some propositions. The rectory in question was no part of the founder's property; but the gift of a subsequent donor on a special trust, which trust is limited by rules different from and in some respects contrary to the statutes of the foundress, according to which

(b) *Vide* Case of Manchester College, *nomine* Rex v. Bishop of Chester, 2 Stra. 797.

(c) *Attorney-General v. Middleton*, 2 Vef. 328. 1 Burn's Eccl. Law, 426.

(d) *Cujus est dare ejus est disponere*.

(e) *Vide* Eden v. Foster, 2 P. Wms. 326.

(f) *Vide* Phillips v. Bury, 1 Ld. Raym. 5. more at large in Skin. 447. Show. P. C. 35. The topics of Bishop Stillingfleet are drawn from foreign laws, to be governed by the ecclesiastical law, which the law of England totally disclaims and rejects.

(g) *Note*; In Vef. this word is *direction*.

(b) *Vide* 1 Burn's Eccl. Law, 417. 4 Mod. 233. Stra. 1139. Rex v. Whaley.

to which statutes only can the visitor judge (b), consequently he has no power to execute this trust, neither can the bishop give a remedy in many cases which may arise on this trust. As a consequence altogether, therefore, here is a nullity of jurisdiction in the visitor, and the relief must belong to the king's general courts of jurisdiction. It is a fact plain and admitted, that the rectory in question was a gift in trust. Lord Chancellor agreed in general, that if a subsequent donor gives the legal estate, or in trust for the college, without a declaration of a special trust, it will fall under the power of the general visitor to judge of the legal property in the one case or the equitable in the other, because by giving in trust for the college generally, and neither creating a distinct visitor nor a special trust, the donor has by plain implication intended it should fall under the general statutes and rules of the college, and be regulated with the rest of their property, although in the latter case a bill must be filed in equity to compel the trustees if they refused; but in the present the testator had declared a particular special trust, which must be carried into execution and the will observed. That the trust is limited by rules differing from and in some respects contrary to the statutes, appears by comparing them. That the visitor can only judge by the statutes of his foundress appears plain from the statutes. It is said the will may be considered as a new statute, if so the visitor is absolutely restrained from executing this trust and the college from obeying. In this case, though the legal estate of the advowson is in the college, it is on a special trust for a particular person described, which puts an end to the visitor's power over it. Suppose after the foundation of this college the crown had granted an advowson or land to the senior fellow, such grant would, according to 4 Leo. 190. (i), have operated to make the senior fellow a sole corporation, and the bishop could not take away the legal estate vested in a sole corporation, though it happened to be part of the aggregate body, and give it to the aggregate body. As to the proposition that the bishop as visitor cannot give a remedy on this trust, it is admitted for the defendant, that if the devise had been to a stranger on the same trust, the visitor could have no power over it. It alters not the case that the corporation

(i) This was admitted in Camb. Univ. v. Crofts in B. R. Pasch. 11 Ann.

corporation of the college are trustees; suppose their trust had been to present a member of another college, the visitor of this could have no power over it. On the first branch of this trust and on the last, where it is to present to a stranger, it is admitted the visitor has no power; but it is contended for over the intermediate branch, because among the members subject to his jurisdiction; and it is compared to the case of a particular estate to the college, *remainder over*; but this case is different, the college there having the absolute ownership during its continuance, but here not. Suppose on a vacancy all the fellows in their turn should do an act which should be deemed by the college an absolute refusal, and they should thereupon seal a presentation to a stranger, and before institution one of the fellows should alledge that he had not refused, but that the college had mistook, and should present him, the visitor on appeal could not judge of this; none but a court of equity could give relief in such a case. Suppose a fellow completely entitled should at the end of the year refuse to resign, the visitor could not compel him, for that is no breach of the statutes. Application must be made to some court of general jurisdiction, who may decree a resignation of the fellowship or living, so this argument for the defendant turns the other way. In *Philips and Bury*, though contumacy was held a good cause of expulsion, the court of B. R. rightly refused to examine into the fact that appeared to be a contumacy within the bishop's jurisdiction. But this is not a case of expulsion; it is sufficient here to shew that the visitor, though general, could not give an adequate remedy in many cases on this trust (k). As to the fifth proposition, that upon the whole here is a nullity of jurisdiction in the visitor, and that relief must belong to the king's general courts of jurisdiction, Lord Chancellor said, he had shewn that the bishop had no power, and whomsoever by this trust has a right must have a remedy. A bill might have been filed after the testator's death to establish this charity and execute the trusts; the visitor would then have had no jurisdiction; but the court would have decreed a complete performance of the trust according to the will. It is no answer to say that such a decree has not been made, for the legal estate is in the trustees, and this trust is for ever execu-

(k) *Vide* Case of Eton Coll. M. 14 Geo. 2. *Rex v. Bland*, where the court held that the bare averment of a visitor would not preclude the jurisdiction of the court; but the extent of his authority must appear, that the court may be satisfied he can do complete justice. A mandamus was therefore awarded.

(l) 4 Mod. 433. Skin. 359.
368. 393. 546. Comb. 279.

(m) *Vide* Case of Clare Hall
Camb. 3 Atk. 674. 1 Ves. 78.

(n) Philips v. Bury, Skin.
447. Show. P. C. 35. 1 Burn.
Eccl. Law, 410.

Vide Rex v. Bishop of Ely in 1783, 2 Term Rep. B. R. 290. where considerable light is thrown on the law of visitation as it affects the property and lands of colleges and the jurisdiction of the courts concerning it. In that case it was held that Mr. Longman, who had been a fellow of Peterhouse in Cambridge, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, was not entitled to any preference in the election of a master (as a member of the foundation) under the express words of the statutes.

4 July 1751, cor. Hardw. C.
Attorney-General v. Middleton,
2 Ves. 328.

The substance of this information does not fully appear in the report, but it may be collected from Lord Hardwicke's arguments.

tory. The reason of the case of *the King and this very college (l)* is very material. It might have been said there, as it has been here, this is a power superadded and annexed to the visitor's: the court said there it arose on the public laws of the land. That arose on a public act of parliament relating to government, and this on the general rules of equity, which is part of the general law. It is said that new donations may be subject to the visitor's jurisdiction, as it has been held new engrafted fellows may (m); but that is not *ad idem*. His Lordship said he was not in general an enemy to visitatorial power, but inclined to support it as far as necessary; and he went farther in the case of *Clare Hall* than Lord Holt did in 5 Mod. 421.; but the reasons on which he founded himself there held not here. There was a plain implication to subject to the general visitatorial power, to avoid the confusion which would arise if every one coming in as a fellow should not be subject to college discipline, and in 2 Jo. 175. it is determined that power of expulsion includes power of admission. The visitatorial power as allowed and established by the law of England, is most useful in learned societies; and his Lordship was for supporting it as established by the constitution of the kingdom, and particularly by the judgment in *Exeter College* case (n); but he was not for extending it further, much less for giving way to and extending it on principles and rules derived from foreign laws, which the law of England rejects. On the whole his Lordship concurred that the plea should be over-ruled.

10. An information was filed against the master and governors of a school, upon the general principle of the power of the court of Chancery to call the trustees to account, as having the general superintendency of all charities and trusts. Two questions arose: 1st, As to the jurisdiction of the court in this case, and whether there were not proper visitors to take cognizance of the complaint? and 2dly, If the court had jurisdiction, whether there was sufficient ground on the evidence to give the

the relief prayed? Lord Chancellor—As to the first question, the information is not proper on the nature of the foundation; another mode of proceeding should have been adopted to regulate and rectify what is wrong. His lordship was not inclined to extend visitatorial powers, because being summary and arbitrary, they are liable to abuse. The nature of the foundation in this case was, a charter from the crown granted upon the petition of two private persons; it is a small grammar school originally endowed with 50 *l. per ann.* and now increased to 80 *l.* This case is distinguished from those of the statute of *Eliz.* on charitable uses or cases before that statute in which the court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein and no charter given by the crown to found and regulate it, unless a particular exception out of that statute, it must be regulated by commission: but there may be an information in Chancery founded on its general jurisdiction; and that is from necessity, where there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate. Where there is a charter, it must be regulated according to the powers of that charter, or left to the original rule of law, for there is no ground for Chancery to establish that charity. It has been often said, that where there is an information for a charity, that information cannot be dismissed without a decree for the establishment of it, though the particular relief prayed for, fails; but where there is a charter, it is otherwise. In the present case, *Queen Elizabeth* granted a charter, which amounted to a licence in the first instance to found a free-school and alms-house. The queen then was the founder. It was upon the petition of *Heath* and *Gilpin*. The governors had a power to remove the master and usher, and to do every other matter that was necessary and expedient for the scholars, &c.; a very large and full power as can be given; but it is subject to some controul; for a power is reserved to the heirs of *Heath*, and the successors of *Gilpin*, (as rector of *Howton*,) to appoint governors, and remove them as often as convenient. What is the result? Whether either the governors or the heir of *Heath* has a visitatorial power over this

* *Vide* Case of Birmingham School, 2 P. Wms. 325.

this School? It has been expressly determined*, that no technical words are necessary for granting a visitatorial power, but it may be by any words shewing that meaning; therefore it was held that the very appointment of governors of an hospital would give that power. A visitatorial power may be divided; one set of visitors to one purpose, and another to another purpose, as in several colleges, and particularly as was held in the great question of *Trinity College* as to the bishop and the crown. The result then is, that if it had rested singly on the power given to governors, Lord *H.* would have deemed the governors visitors; but it is here objected that the estate and revenue is vested in the governors, and that they cannot be visitors because they cannot visit themselves; that is a material objection, for they might misapply the revenues, and it has been so held*; but it was never held that governors cannot be visitors merely because the legal estate of the charity is vested in them†. Here the governors have only the legal estate in them, not receiving the revenue, which the master does from time to time and accounts for it, which brings it to the case of *Sutton Hospital*; but it differs from that case in regard that here there is a superintendency over the governors; and a visitatorial power may be divided. If then the governors are not visitors, the heir of *Heath* and the successor of *Gilpin* certainly are; and the power to remove governors includes every thing. This foundation, therefore, is of the same nature as *Birmingham School*. The visitatorial power is either by the governors, or in the heir of *Heath* and successor of *Gilpin*, who meant to vest the whole power in his successor to the rectory. The information in this case complains of a misapplication of the revenue by the governors, which is a misbehaviour they cannot correct. That objection has no weight; for it is not suggested that the governors have applied any thing to their own use. No court of equity will therefore do otherwise than regulate for the future by removing the governors. This case is not within, but excepted out of the statute of charitable uses; for this is a free-school, having special governors appointed by the founder. On the whole, this information is improperly brought in respect of the jurisdiction: there are visitors of this charity somewhere; the proper

* *Vide* *Sutton v. Colfield*, Duke's Char. Uses, 68, 69.

† *Vide* the case of *Sutton Hospital*, 10 Co. 31. which is exactly in point; that hospital was founded just as Queen *Eliz.* did the school in this case. What the court went on there was, that vesting the legal estate of the corporation in the governors would not exclude them from the right of governing and visiting, for none of the money could come to their hands; it might have been otherwise if they had been in receipt of the rents and profits.

proper place to apply for misbehaviour is to the governors; and if they refuse, application should be made to the rector, &c. to remove them and appoint others.

As to the second question—The principal relief prayed was to remove the present master, as not being qualified by the statutes, and appoint another. In that the court cannot interpose in the first instance, for no application has been made to the governors, to whom the charter gives a power of removal; that would be going *per saltum*. If the visitors were out of the case, it should not come into this court but on the gross misbehaviour of the governors. It is said the governors have made an improper election, and statutes are produced, which are without name or date. It is strange to come into equity to execute statutes of a private foundation under a charter; the statutes do not appear to have been observed in any one instance; a repeal of them must be presumed; a court of law would do so on evidence to a jury; for the rule of law is, that a corporation has power to make bye-laws. A court of law will direct a jury to find a bye-law; and on account of non-observance, will presume a subsequent bye-law to repeal and alter. As to the application of the revenue to the scholars, it seems to be arbitrary, according to the discretion of the governors as they see cause; but things and times have altered; for though at the Reformation greater invitations were made to bring the poor to schools, it is not now so proper as to train them to agriculture*. It would be of no purpose to decree that the governors should now pay to the poor scholars the 7*d*. per week required by the statutes, for it would not be sufficient for them.

There is no ground on either point to give relief. The information must be dismissed, and with costs, because it seems to proceed from motives of private revenge in the relator, though it bears a plausible appearance on the face of it.

11. *New College in Oxon* having by a charter particular powers as to the grammar school at *Bedford*, such as the removing the master for misbehaviour, &c. As to any thing of that kind, Lord Chancellor thought it would be too much for the court to interfere, though they were not appointed general visitors, but as to the management of the

C 3

revenue

* *Vide* Attorney-General v. Price, 3 Atk. 108.

15 July 1754, cor. Hardw. G.
Attorney-General v. Bedford Corporation, 2 Vef. 505.

Charity and Charitable Uses. § 1.

revenue of the school, the court might do something.

The college in 1739 had appointed one of their fellows *master* and another *usher*, (which had never been done before,) at a yearly salary. It was in proof that the usher constantly resided at the college, and the master received all the salaries. The master admitted, that upon his appointment there were but three boys, and at the time of his answer but eleven, and insisted that he was accountable only to the usher for his salary; and that as he had lived upon it, he was not obliged to refund it. *Per* Lord Chancellor—The master cannot be said to have lived on the usher's salary, as he looked upon himself accountable to the usher first. This was a collusion between the master and the usher to make a sinecure for the master. There was no occasion for an usher where there were such few scholars. His lordship, for the sake of justice, ordered the master to account to the charity for the usher's salary for 15 years back.

H. 1793, cor. Lds. Comcs.
Attorney-General v. Foundling
Hospital Governors,
2 Ves. jun. 42—51.

12. Defendants entered into contracts for letting the fields round the *Foundling Hospital* on building leases. The charity subsisted under letters patent, which were confirmed by parliament in 1792. The meadows round the hospital let for 300*l.* *per annum*.

A motion was made to restrain the defendants from proceeding on these contracts, upon an information for an injunction against the buildings. The first ground for an injunction was, that defendants had no right to deviate from the original design of the charity, which was, that it should be in the country, and that the health of the children might be affected by the making of bricks so near the hospital. In support of this was read a report of a committee in 1753 upon the occasion of building the present hospital, which recited, that experience had shewn that no place could be found in *London* fit for the purpose of the charity, and for exercising the children and employing them in the open air. The second ground was the risk of the undertaking, for which there was no necessity, the funds of the hospital being fully adequate to its purposes. Thirdly, that the contracts themselves were improvident, particularly in the article of gravel. The defendants were not charged with any bad intention, but with a deviation only from the

the plan and original design of the charity. The defendants by their answer insisted on their powers to alien and demise.

Eyre, Lord Commissioner—There is nothing better established than that this court does not entertain a general jurisdiction to regulate and controul charities established by charter. There it is fixed, and the court cannot alter it. If the governors established for the regulation of it are not those who have the management of the revenues, this court has no jurisdiction; but if the governors have also the management of the revenues, the court does assume a jurisdiction of necessity, so far as they are to be considered trustees of the revenue (a). The result is, this court must not hastily take upon itself to interfere with those who have by charter or by act of parliament (as in this case) the whole controul over a charity. But where having at the same time the management of the revenues, if they are abusing their trust, this court has jurisdiction. It might have been probable that it was part of the original plan that this establishment should be in the country; if so, to bring a town round it would be changing the plan, and would have such a tendency to pervert the end of the institution as would have authorized the court to interpose upon the ground of a breach of trust. But it does not appear that such was the original plan, neither does it appear that the plan now proposed will endanger the health of the children. There is nothing which calls upon the court by evidence (upon affidavit) to stop the hands of the trustees by injunction. The prayer of the information must fail, unless it can be maintained that it is in the nature of waste to turn profitable meadow into buildings. As to the question, Whether the contracts entered into are clearly improvident, and upon that to justify an injunction? that is not within the prayer of the information, which says there should be no buildings at all. The presumption is, that the trustees are doing their duty, till it appears *è contra* that they are not. Upon the whole, where there is a charter establishment of this kind, with governors to conduct it, they have a power in themselves, and the court have nothing to do with it, unless there be breach of trust; and upon applying for an injunction, a high probability must be shewn that such is the case before an injunction can go.

(a) *Vide Attorney-General v. Smart*, 1 Vef. 72. and *Attorney-General v. Middleton*, 2 Vef. 327.

Asbhurst, Lord Commissioner—There is no doubt but that this court has a controlling power over all charitable institutions. As little doubt is there that the court will grant an injunction where there is probable or positive evidence that the trustees are acting contrary to their trust. Those who come for an injunction must clearly make out such a case. In this case it is not made out even by probable evidence, nor is it fit for the court to throw a stigma upon the governors by saying they are acting inconsistent with their duty.

Wilson, Lord Commissioner—The defendants are a corporation, governing the charity by charter and act of parliament. If it can be made out that they violate their trust it will be proper to stop and punish them, otherwise the court has no jurisdiction to take it out of their hands. It is not pretended that the trustees are doing any thing for their own benefit, only that they may injure the charity; but there is no evidence of that. It has been said, their bargain has been improvident; but that does not appear. Then there is a question, Whether it is better to have houses or meadow land? It is better to have houses than land so near London. It cannot be ascertained whether the intended buildings will let so well as is expected; but at present it appears a beneficial thing. Injunction refused.

SEC. 2. What is a good Charitable Use, to be protected by the 43 *Eliz.*, and what is a good Devise or Appointment thereto, notwithstanding the Statute of Mortmain; and where a Defect in such Devise or Appointment shall, or shall not, be made good in Equity,

H, 1690, cor. Lds, Comrs.

Joy v. Slaughter,

Proc. in Ch. 16.

Vide Attorney-General v. Rye,

2 Vern. 453.

M. 1703, cor. Wright, C. S.

Attorney-General v. Rye & al.

2 Vern. 453.

Vide Rolt's Ca. Mo. 888.

Flood's Ca. Hob. 136. Damers'

Ca. Mo. 822, Rivett's Ca. Mo.

1. **T**ENANT in tail, without levying a fine or suffering a recovery, may appoint to a charity; and it shall bind him in remainder, though he does not come in under the tenant in tail.

2. *M. F.*, tenant in tail, devised the premises in question for the maintenance of a schoolmaster and other charitable uses. The question was, Whether such a devise was good against defendant who claimed under the intail, no fine being levied

or

§ 2. What a good Devise or Appointment.

C—2 23

or recovery suffered. *Lord Keeper*—The intent of the statute was to make the disposition of the party as free as his mind, and not to oblige him to the observance of any legal forms. Decreed a good appointment within the statute.

3. Dr. F. by will devised divers freehold, copyhold, and leasehold lands to trustees for maintaining several poor scholars of *Sidney College*, and for other charities in his will mentioned. The will was written in testator's own hand, but had no witnesses. Testator afterwards made a codicil, revising his will, which he duly executed in the presence of four witnesses, and then died. Testator surrendered the copyholds to the use of his will (a). Upon a bill for a specific performance of the trusts of this charity, Lord Chancellor declared himself very unwilling to break in on the statute of frauds. The judges, his lordship said, had carried several cases on the 43 *Eliz.* to very great lengths in favour of charities (b), which occasioned the distinction between operating by will and appointment, which surely the makers had never thought of (c). Lord Chancellor, after taking time to consider of it, declared that the will not being good as a will, could not operate as an appointment.

will attested according to the statute of frauds. *Hussey v. Grills*, Amb. 229. — (b) *Vide Duke's Char. Uses*, 120. — (c) *Vide Jenner v. Harpur*, Prec. in Ch. 389. 1 P. Wms. 247. *Gillb. Eq. Rep.* 44. where a parol devise out of lands was held not a good appointment under 43 *Eliz.* though before the statute of frauds. *Vide also Adlington v. Cann*, 3 Atk. 141.

4. A wife having power to dispose of her personal estate, which only comprehended what she had before marriage, got afterwards into the possession of a large personal estate in a private manner, upon the death of her father; and concealing the same from her husband, disposed thereof to charities. Held, that what was so concealed from the husband, should not be made good to him, so as to disappoint the charities,

5. Tenant in tail, by a nuncupative will, devised a rent to a charity issuing out of lands. The commissioners for charitable uses decreed this good as an appointment under 43 *Eliz.*, though void as a will. But Lord *Harcourt* reversed their decree, (though the will was made before the statute of frauds,) for that it was as much required by the 32 *Hen. 8.* of wills as by the statute of frauds that a will of land should have three witnesses (a).

890. *Platv. St. John's College*, 1 Ch. Rep. 267. *Tay v. Slaughter*, Prec. in Ch. 16. *Attorney-General v. Burdett*, 2 Vera. 755. *Vide Attorney-General v. Sutton*, in Dom. Proc. *post*, pl. 3.

M. 1707, cor. *Cowper, C. Attorney-General v. Baines or Barnes*, 2 Vern. 597. Prec. in Ch. 270. 3 Ch. Rep. 81. *Gillb. Eq. Rep.* 5.

1 *Eq. Abr.* 47. pl. 7. *Case of Sidney-Suffex Coll. Camb.*

(a) It was urged and admitted that the devise of the leasehold and copyhold was good, for that the copyholds passed by the surrender, and not by the will. *Vide Attorney-General v. Sawtell*, 2 Atk. 497. *Wagstaff v. Wagstaff*, 2 P. Wms. 258. *Attorney-General v. Andrews*, 1 Ves. 225. and *Tuscol v. Page*, 2 Atk. 37. where copyholds were held to pass by an unattested will without a surrender, for that the statute of frauds related only to such estates as pass by 34 & 35 *Hen. 8.* which does not extend to customary estates; though a customary freehold, where there is no custom to surrender to the use of a will, can only pass by a

(b) *Vide Duke's*

11 May 1711, Dom. Proc. *Pilkington, Bart. v. Cutbertson, Widow*, 1 Bro. P. C. 337. 4 *Vin. Abr.* 131. c. 7. 483. c. 23. *Gr. & Rud. of Law and Eq.* 122. c. 23. 2 *Eq. Ca. Abr.* 149. c. 4. 5. 191. c. 4.

T. 1714, cor. *Harcourt, C. Jenner v. Harper*, 1 P. Wms. 247. *Salk.* 163. Prec. in Ch. 389. 2 *Eq. Abr.* 191. pl. 5. See this case more at large, *post*.

(a) *Vide Attorney-General v. Baines*, 2 Vern. 597. Prec. in Ch. 270.

P. 1717, cor. M. R.
Piggot v. Penrice,
 Gilb. Eq. Rep. 137, 138.
 2 Eq. Abr. 191. pl. 6.

M. 1717, cor. M. R.
Attorney-General v. Burdett & al.
 2 Vern. 755.
Vide Christ's Hospital and
 Hawer, Duke's Char. Uses. 84.
Vide Attorney-General v. Rye, ante, and notes.

20 Dec. 1721, Dom. Proc.
Attorney-General v. Sutton and
another, 1 P. Wms. 754.
 2 Bro. P. C. 382. Forfeis. 66.
 Fitzg. 13. 8 Mod. 257.
 3 Vin. Abr. 240. (n.) to ca. 4.
 255. ca. 22. and (n.)

(a) It appeared that preceding the limitation of the premises to the testator's nephew for life, &c. was a declaration that if the nephew should refuse to convey the legal estate of the premises to the uses of the will, or to acknowledge the trust thereof in manner therein mentioned, then "all gifts, legacies, and bequests in the said will given, devised, and bequeathed to the said nephew and the heirs male of his body," should be void.
 2 Bro. P. C. 383.

6. *A.* made a settlement of lands with power of revocation by writing to be executed under hand and seal in the presence of three witnesses; not being menial servants; and in her illness, by letter, desired a deed of revocation to be prepared, but died before it was done, having by will given part of these lands to charitable uses; decreed at the Rolls to be good as an appointment upon the act of parliament, though there was no revocation.

7. An appointment by a tenant in tail to a charity shall bind the reversioner in fee. The statute of charitable uses supplies all defects of assurance which the donor was capable of making.

8. *John Sutton*, being seised in fee of the legal estate of the *Chequer-Inn in Holborn*, and of the trust or equitable estate of lands in *Suffolk*, which he had formerly purchased in the name of his brother *Thomas*, and which on his said brother's death had descended to his son, (testator's nephew,) *J. S.* by will in 1696 charged all his estate with the payment of his debts, and directed his nephew and trustee to convey his *Suffolk* lands to the use of his will; then he devised all his lands in *Suffolk* and the *Chequer-Inn* to his said nephew for life (a); remainder to his first and second son in tail male, (going no farther,) and after the nephew's death, without issue male, then to trustees for charities. The nephew suffered a recovery, and died without issue. Upon this the appellants filed their bill in the Exchequer by way of information to have the charities established. Respondents pleaded that the nephew being tenant in tail by the will, had suffered a common recovery, and thereby barred the charities, which plea being allowed by the barons, the present appeal was brought. Respondents claimed under the recovery, and appellants under the charities. The question, therefore, was, Whether the testator's will gave an estate tail to his nephew, and whether the nephew's recovery barred the charities? After great argument at the bar of the House, the Lords agreed, that, as to the *Chequer-Inn*, wherein testator had a legal estate, the recovery was clearly a good bar to the charities; but with regard to the trust estate in the *Suffolk* lands, and which the will directed should be settled to the same uses as the *Chequer-Inn* was devised, some

of

§ 2. *What a good Devise or Appointment.*

C—a

27

of the lords doubted that there being a direction for the trustees to convey it, gave a handle to a court of equity to interpose; and if the court did interpose, it was reasonable to help the intention of the party, imperfectly expressed in his will, and it would be a compliance with the testator's intent to give assistance in respect to the remainder limited to the first and second sons of his nephew by ordering an estate to trustees during the life of the nephew, and so put it out of his power to bar the remainder to the first and second son; and as the charities were to take in case, only, the nephew should die without issue male, it would be equally just to preserve such intention by limiting a remainder to every other of the sons of the nephew to the trust estate, and then a remainder to the charities. But other lords differed, being of opinion that equity (as to the limitations of estates or trusts of estates) ought to follow the law; and that were it otherwise, it would occasion the greatest uncertainty, and most precarious determinations of property (a). However, some of the *law lords* differing in opinion, the *bishops* made a majority for reversing the order of the court of Exchequer *in toto*, as the order of that court had only allowed the plea, and the respondents could only be put to answer, so that the right as against them was not in any manner determined.

(a) Lord Harcourt here cited an expression of *Mr. Justice Twissden*, who, when pressed to a matter on behalf of a charity which he thought against law, said, "I like charity well, but will not steal leather to make poor men's shoes."

1 P. Wms. 1765. (n.)

In consequence of this order by the lords, the respondents answered, and on the 30th Jan. 1732 the cause came on in the Exchequer by the name of *Attorney-General v. Young & al.* (b); when the barons decreed that the recovery suffered by the testator's nephew of the trust estate was void, the same being contrary to the trusts created by the testator's will, and that respondents should convey to the trustees for the charity, and awarded a perpetual injunction to quiet them in the possession. With respect to the *Chequer-Inn*, the barons retained the information, with liberty for either party to try their title at law; whereupon the respondents brought their ejectment, which was tried in *Hil. Vac.* 1735, and the jury found a special verdict, viz. the testator's will, and all facts necessary to bring the matter of law before the court. In *Easter* term 1737, the verdict was argued; and in *Trinity* term the court gave judgment for the lessors of the plaintiff, viz. that the nephew took an estate tail in the *Chequer-Inn*; and in

(b) Reported 2 Com. Rep. 413.

June

June 1737, the court ordered the tenants to attorn to the respondents.

T. 1726, cor. King, C.
Attorney-General v. Gill,
2 P.Wms. 369.
2 Eq. Abr. 193. pl. 13.

9. One by will devised an annuity of 50 *l.* and also 100 *l.* in money to *A.* and his heirs, and if *A.* died without heirs, then to a charity. *A.* died without issue, and then testator died. Upon an information against testator's executor to establish the charity, it was contended, that the devise of the remainder ought to be supported, as given to a charity. Lord Chancellor—The devise being to *A.* and his heirs, and if *A.* die without heirs, then to a charity, such devise over is void, and the word *heirs* shall not be construed to signify *heirs of the body* where the devisee over is not inheritable (a). And the death of the first devisee in the lifetime of the testator can make no alteration if the will was void at the making.

(a) So, *Allen v. Spendlove*,
2 Eq. Abr. 305. pl. 2. *Nottingham v. Jennings*, 1 P.Wms. 23.
Tyte v. Willis, Ca. temp. Talb.
1. *Tilburgh v. Barbut*, 1 Vef. Doug. 254.

H. 1732, cor. M. R.
Brown & al. v. Langley & al.
2 Barn. Rep. 113.
2 Eq. Abr. 416. pl. 14.

10. On a bill brought by the next of kin to the deceased, against the executors, for a distribution, the executors in their answer set forth a clause in the will, whereby the testator gave the residuum of his estate to the poor of the parish of *K.* in *Com. L.* It afterwards appeared that this parish of *K.* was not in *Com. L.* but in *Com. N.*, and that the testator really thought that this residuum would not amount to above 10 *l.*, and that he declared so at the time of making his will; whereas it amounted to near 1000 *l.* His Honor's opinion was, that parol evidence ought to be admitted to help out the description of the parish, and that this was a settled rule in equity, and therefore that the parish of *K.* in *com. N.* were well entitled under the will, but that such evidence ought not to be admitted in relation to the quantity of the thing devised. Bill dismissed.

1732, cor. King, C.
Attorney-General v. Hickman,
W. Kel. 34. 2 Eq. Abr. 193. pl. 14.
Vide Attorney-General v. Rye,
2 Vern. 453. Attorney-General v. Burcott, 2 Vern. 755.

11. A devise to trustees for the benefit of a charity; the trustees die in the lifetime of the testator; though it be a lapsed legacy in law, it is subsisting in equity.

M. 1734, cor. Talb. C.
Lloyd & al. v. Spillett & al.
3 P.Wms. 346.
2 Eq. Abr. 241. pl. 30.
776. pl. 25.

12. *J. S.*, uncle to plaintiffs, being seised and possessed of considerable real and personal estates, by will in 1721, devised annuities of 15 *l.* to each of the plaintiffs, and gave some specific legacies. The residue testator devised in trust for those persons that
are

§ 2. What a good Devise or Appointment.

C—a 19

are commonly called dissenting ministers, particularly naming some of them. This was held a good devise to the ministers.

13. There was a devise to charitable uses under a will in 1734; the testator lived till July 1736, a month after the new statute of mortmain took place, and then died without revoking his will. Upon a reference to the judges for their opinion, whether this was a good disposition to charitable uses, all of them except Mr. Justice Denton (who was ill) certified that the devise was good in law, notwithstanding the statute; whereupon Lord Hardwicke declared the will should be established, and the trusts of the charity carried into execution (a).

26 April 1740, cor. Hardw. C.
on the equity reserved.
Albburnham v. Bradshaw,
2 Atk. 36. Barnard. 6.

(a) *Vide* Attorney-General v. Lloyd, 3 Atk. 551. 1 Ves. 32. Attorney-General v. Andrews, 1 Ves. 225. Willet v. Sandford, 1 Ves. 186. Attorney-General v. Heartwell, Amb. 451. Attorney-General v. Downing, Amb. 550.

14. John Naylor in 1738 made his will in these words: "I will and desire that my executors within twelve months after my decease, do settle and secure by purchase of lands, of inheritance, or otherwise as they shall be advised, out of my personal estate, one annuity, or yearly payment of 50*l.*, to be paid yearly, and distributed for ever by my executors, their heirs and assigns, among the poor and indigent people of *Lecke*, in such manner as they shall think fit. And my will also is, that my executors do settle and secure one other annuity of 5*l.* to be paid yearly to the vicar of *Lecke* for the time being for ever, for preaching an annual sermon." And the testator devised the residue of his personal estate to be equally divided between his sisters. Per Lord Chancellor—The only question in this case is, Whether the devise of the two annuities of 50*l.* and 5*l.* to charitable uses, is void by the late statute of mortmain?

6 Aug. 1740, cor. Hardw. C.
Sorresby v. Hollins, 9 Mod. 221.

It is insisted upon by the plaintiffs, the residuary legatees, that it is void, because the direction of the devise is to settle and secure the annuity by a trust of lands of inheritance, and though the words *or otherwise* are added, they will not vary the case, for testator's intention was to give the annuity out of lands of inheritance. But his lordship was of opinion upon this act of parliament, that this bequest was not void, and there was no authority to construe it void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities, merely as such, or to prevent the establishment or creation of them; but

is

is designed against the cases of perpetual charities in lands, and (as the title imports) to restrain the disposition of lands, whereby the same become unalienable. The whole recital and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited. And though there is a clause to prohibit money being laid out in lands, to such purposes as would make them unalienable, yet there is no restriction whatsoever upon any one from leaving a sum of money by will, or any other personal estate to charitable uses, provided it be to be continued as a personalty; and the executors or trustees are not obliged, or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. And in the first words they do fall within them; for the testator directs, that his executors shall *settle and assure by purchase of lands of inheritance*; and if the testator had rested upon such first words, the devise had been clearly void. But then he goes on, in the disjunctive, *or otherwise as my executors shall be advised*. And if a devise in the will is in the disjunctive, and leaves to the executor two methods to do a particular thing by, the one lawful, the other prohibited by law, can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall be pursued, and take effect. It hath been further argued against this devise, that the words *for ever* shew the annuities must arise out of some real estate, which only is capable of supplying them *for ever*; for personal funds are too perishable and transitory in their nature to answer such everlasting annuities. And suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity, it may so happen that the company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled; for if the company should be dissolved, the principal stock may be taken out, and vested in some other company; and there may be annuities that may probably continue for ever, and yet not payable out of land. His lordship mentioned an instance of one which

has

§ 2. *What a good Devise or Appointment.*

C-a

31

has lasted a century and half, and may exist perpetually, viz. Sir Thomas White's charity, being a disposition of money to be employed by continual rotation, in loans to poor tradesmen, of several sums, to be lent for a settled number of years, and then to be repaid. And any man may at this day give by will a perpetual charity in this manner; but if a man by will secures such loans by lands or purchase of lands, such devise shall be void, and contrary to the late statute of *mortmain*. If this case had been to be considered before the act, the court would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands; but when this court is precluded from doing it in this manner, if it can be obtained in any other, there is no reason to say the devise is void. It is said too, that the words *heirs and assigns* import a purchase in land, or some real thing, for no personal thing can descend to heirs; and if the money is to be inserted in a personal security, it will not go to the heirs, but to the executors, and so the intention of the testator will not be pursued. Suppose an obligor binds himself, his heirs, executors, and administrators, in a sum of money to a papist, who obtains judgment on the bond, and takes out an *elegit*; in this case it was held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment; and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his land, or his heirs who represent him in his landed capacity. And this comes up to the present case, which may secure the charity in a double sense either upon land or personalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. Upon the whole Lord Chancellor thought there was nothing that made this bequest void in every part, but that it was good in that way which the law does not forbid. But it should not be questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land, for any charity, and in the mean time (till it can be laid out) to be invested in government securities for the benefit of the charity, but that *that bequest* will be void, because the final end and intention of such testator was, to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till

till a proper purchase of land, or rent-charge offered. As to the annuity of 5 l. there are fewer objections to *that* than to the other; for there is no direction at all for any money or personal estate to be laid out in land; for the executors are only willed to *secure and settle* 5 l. a year for the purpose there mentioned, and it must be secured upon a personal fund, consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament. And as it is often said in old books, that "I was by at the making of the act" of parliament, and the meaning and intention of "it was then said to be this or that," so his lordship said he was by at the making of *this* statute, and it was at that very time said by the legislators, that it would not hinder any charitable distribution of a *personal* estate. Decreed therefore, that the devise was good, and that the money should be invested in *South-Sea* stock, for the charitable purposes mentioned in the will.

8 Feb. 1742, cor. Hardw. C.
Attorney-General v. Sawtell,
 2 Atk. 497.
Wagstaff v. Wagstaff, a P.
 Wms. 2:8. was cited in support
 of the will.

15. Sir J. T. devised copyhold lands in charity that he had before surrendered to the use of his will, which consisted of eleven sheets, the two first of which he signed *in extremis*, but died before he could sign the rest. There were not any witnesses to the will, yet Lord Hardwicke held it to be a good appointment of the copyhold estate for the charity under the statute of 43 Eliz. c. 4.

[3 July 1744, cor. Hardw. C.
Arlington v. Caun,
 3 Atk. 141—156.

16. *Lawrence Hollister* by will in 1725 disposed of his estate for the building of a charity school and other charitable purposes. Then came the statute of 9 Geo. 2. c. 36. and the testator apprehending that this disposition would come within that statute and be avoided thereby, made another will on the 1st of August 1738, whereby he devised the premises to defendants, *William Cann* and *Mary Andrews*, and their heirs, without any trust appearing on the face of the will. But on 9th of same August he subscribed a writing, which was found after his death, wherein he recommends to his executor *W. C.* "to assist *M. A.* and to see the will performed according to the humble request and according to the wonted and well disposed charitable disposition of said *Cann* towards all men, to bring the whole affair to its desired issue." The testator died soon after, and the plaintiff, who was his only daughter, and heir at law, filed her bill to have the devise set aside,

§ 2. *What a good Devise or Appointment.*

C— 33

as void by the act. The defendants insisted on the will, as an absolute gift to them, and that parol evidence of a trust for a charitable purpose, was to be admitted by the statute of frauds and perjuries (29 Car. 2. c. 3.), and denied their ever having seen or heard of any other writing, but the above paper, signifying any declaration of trust concerning any charitable use, or that any such directions as are mentioned in the above paper, were ever given by the testator to *M. A.*

It was in proof that the testator had a little before his death given directions for drawing a plan of a public building, and several witnesses were likewise examined to prove his intent to leave his estate for building a school or hospital.

The question was, Whether here was a specific declaration of trust for a charitable purpose, to bring the case within the 9 Geo. 2. and whether to bring it within that statute the trust must be sufficiently declared within the statute of frauds and perjuries? and, lastly, Whether the above paper was a sufficient declaration within the last-mentioned statute? Lord Chancellor *Hardwicke* said, he was under some difficulty about determining this point, from fear of breaking in upon the statute of frauds on the one hand, and the statute of mortmain on the other. The question has arisen purely from a mistake of the testator, who thought his first will, though made before the statute of mortmain, might be affected by it, which it could not have been, as was certified to the court by all the judges in the case of *Asbburnham and Bradshaw* (a)

The first question is, Whether the present case is within the statute of frauds and perjuries?

His lordship said, he thought it was; and he should do greater mischief by determining it otherwise than by leaving a loophole to elude the statute of mortmain. In some instances devises to charities and charitable uses have been held over and over again to be within the statute of frauds and perjuries (b). It has been endeavoured indeed to make wills, not properly executed within that statute, to operate as appointments; but this could never prevail. And therefore in all cases of charities that have come before the court, it has been held, that the declaration of trust for a charity must be *express*, as the statute of frauds and perjuries

VOL. II.

D

juries

(a) 2 Atk. 36. Barn. 6.

(b) *Vide Attorney-General v. Barnes*, 2 Vern. 593. 2 P. Wms. 260.

* By 29 Car 2. c. 3. § 7. it is enacted, "That all declarations
"or creations of trust or confi-
"dences of any lands, tenements,
"or hereditaments shall be ma-
"nifested and proved by some
"writing, signed by the party,
"who is by law enabled to de-
"clare such trust, or by his last
"will in writing, or else they
"shall be utterly made void and
"of none effect," &c. &c.

(c) 3 P. Wms. 344. 2 Atk.
148.

(d) The same solemnities are required by the statute of frauds to dispose of a trust or equitable interest in freehold lands as of a legal estate in such lands; nor can a testator revoke a trust any more than he can devise it without those solemnities.

Vide *Wagstaff v. Wagstaff*, 2 P. Wms. 258. *Duke of Marlborough v. Lord Godolphin*, 2 Vef. 76. *Jones v. Clough*, 2 Vef. 36. *Duff v. Daisell*, 1 Bro. Ch. Ca. 147. *Casson v. Dade*, 2 Bro. Ch. Ca. 541. cited.

juris directs*. So it was determined in the case of the *Attorney-General v. Spillett* (c), heard first by Lord Talbot and then by his lordship in 1739, though there were some very strong circumstances in that case to have supported the charity. It was said indeed, that the words of the statute of mortmain are so general as to take in every trust, whether by parol or writing; and that this being a later law than the statute of frauds, is not bound to be construed by it. But he was of opinion that the source of a trust or declaration of a trust in the statute of mortmain ought to be directed by the statute of frauds, which did *Normalm imponere futuris*, as to the meaning of the word *trust*, what should or should not be a trust.

So upon the Popish act, 11 & 12 W. 3. whereby devises in trust for papists are made void, the definition of a trust is taken from the statute of frauds (d); and if a bare parol averment of a trust for a charity upon a will was to be allowed, the statute of mortmain would be attended with much more mischievous consequences than ever it can do good.

The next thing to be considered is, Whether the paper writing be a sufficient declaration of trust within the statute of frauds, which depends upon the words of it; and he thought it was not. Had the testator made a feoffment to himself and his heirs, this paper might have been a good declaration of the use; but here we are in the case of a will, which passes both the legal and beneficial interest to the devisee. The will is dated 1st August and the paper 9th August, so that if the paper does any thing, it must enure as a revocation of the will, which it cannot do for want of proper execution within the statute of frauds; as trust and equitable estates can no more pass by any writing not properly executed within the statute (*viz.* by section 5, in presence of three or four witnesses) than legal ones can (e). And here being no sort of fraud nor misrepresentation proved to be used on the testator, he thought this was not a sufficient declaration of trust within that statute.

But supposing this a case not within the statute of frauds, and that it might admit of parol evi-

dence

(e) Vide the former notes to this point.

§ 2. What a good Devise or Appointment.

C-2 35

dence to prove the intent, is there any proof that the testator intended that the whole of his estate should go to charitable uses? which must be ascertained, and the *quantum* appear which he intend to give, before it can be decreed how much must go that way (f). It is expressly sworn by the defendant *Andrews*, in her answer, that the testator once talking to her about the estate, said, that he had given her and the other defendant his estate by will "to dispose of as they pleased;" and had at another time said, "don't dispose of too much of it." Now even admitting this not to come within the statute of frauds, still here is no rule to draw the line by, how much shall go to this charity. He may have given these two persons his estate to carry on his intent of building a school; but the quantity that shall be applied that way he has left to their discretion; and therefore how can the court determine what part to let the plaintiff into. This is a case which can scarcely be preceded: few people will leave their trustees such unlimited power as this testator has done; the many abuses of trusts are a sufficient warning against it.

(f) It seems that where a testator shows an intention to create a trust very slight expressions are sufficient to effectuate that purpose, if they are made in the will. *Vide Harding v. Glynn*, 1 Atk. 469. &c. notes.

The last consideration is, What is proper for a court of equity to do in the present case? His lordship said he was under no obligation to make a decree, as the party could have a remedy at law, and indeed this is a mere legal title (g). The statute of mortmain avoids the devises to charitable uses, so that it is the devise of the *legal estate* itself, not barely of the *trust*, which is made void, and is just the same as a devise in trust for papist within 11 & 12 W. 3. where not only the trust but also the devise of the legal estate itself, is made void. In the case of *Carrick v. Errington* (h), which was upon a conveyance, the whole was held not to be void, because part of the trust was for children unborn; whereas, had the trust been for all papists, the whole devise of the legal estate had been void. His lordship therefore could do but one of two things; either retain the bill, and give the plaintiff opportunity to bring an ejectment, it being a very hard case upon her who is an only child, and disinherited; or else dismiss the bill without costs.

(g) *Vide Doe ex dem. Phillips v. Aldridge*, 4 Term Rep. 264.

(h) 2 P. Wms. 361.

The parties immediately chose to have the bill dismissed without costs.

17. A. devised his real and personal estate to *St. Bartholomew's Hospital*; and it being doubted whether

M. 1744, cor. *Hardwicke, C. Attorney-General v. Landerfield*, 9 Mod. 226.

whether this devise was within the statute of mortmain, the governors of the hospital and next of kin came to an agreement that one-fourth should be paid to the next of kin, and the other three-fourths to the hospital. This agreement was established by a decree, and carried into execution.

26 Feb. 1754, cor. Hardw. C.
Grimmett v. Grimmett,
2 Amb. 210.

Fide Gries v. Case, 1 Ves.
Jun. 448. 498, L. 3. where the
Lords Commissioners have com-
mented on this case.

18. *W. G.* by will, dated 13 March 1749, de-
vises to his brother *J. G.* 20 *l.* a-year during his
life, to be paid him half-yearly, out of the interest
money in the public funds or mortgages, or any
his real or personal estates of which he should
stand invested, and gives the residue of his real
and personal estate to his wife for life, and to dis-
pose of at her death; and then directs the remain-
der of his estate after his wife's death, to be di-
vided into twenty-four parts, nineteen of which
he disposes of; and by codicil, dated the next day,
he limits the remaining five 24ths, after the death
of his wife and payment of his debts and legacies,
and also the 20 *l.* a-year after the death of his bro-
ther, to be applied in cloathing and educating
twenty poor boys, sons of parishioners of *Bright-
elmstone*, in the principles of the protestant religion,
agreeable to the present established church; and
that the five 24ths of his estate, after his debts
and legacies paid, together with the 20 *l.* a-year
after the death of his brother, or which should be
deemed as an equivalent to the 20 *l.* a-year, 570 *l.*
to be invested in some of the public funds where
there is a parliamentary security, to stand in the
name of the trustees, until the whole can be laid
out in the purchase of lands to the satisfaction of the
governors and trustees (whom he appointed); which
lands were directed to be purchased in the names
of the trustees, to the uses aforesaid, that is, the
interest, profits, and rents of the five 24ths of his
estate, together with the interest, profits, and rents
of the said 570 *l.* after the death of his brother, or
the lands which should be purchased therewith
should be applied annually for ever, in cloathing
and educating twenty poor boys as aforesaid. The
testator left no real estate.

Soresby v. Hollins, 9 Mod.
221. and *Grayson v. Atkinson*,
2 Ves. 454. were cited for the
charity.

Two questions arose; 1st, Whether the devise to
the charity was within the statute of mortmain,
and void?

2dly, If it was, where the money so devised
shall go? Whether to the next of kin of the testa-
tor, or pass to the wife as part of the residuum?

Per

§ 2. *What a good Devise or Appointment.*

C—a 37

Per Lord Chancellor—It would be a hard construction to say, such a charitable bequest is void by statute. If a person directs money to be laid out in lands for a charitable use, it would be void, although the court would order the money to be placed in the funds till the purchase is made; so where a man gives it in such a manner, that the land to be purchased is the final end and thing given. But where there is sufficient room for the court to say there is a discretionary power in the trustees to lay the money out, one way or other, either in the funds or in lands, such a devise has been determined to be good (a); and his lordship thought there was room to construe this bequest with such latitude.

(a) As in *Soreby v. Hollins*, and *Grayson v. Atkinson*.

His lordship did not lay any weight on the directions to place the money in the funds, in the first place; for that would be to make the validity of a will depend on the order of the words: the direction is, to place the money in the funds, *until laid out in lands to the satisfaction of my trustees*: When can that be? not while this statute is in force. Suppose it had been "till by law it may be," such bequest would be good. Those words must mean when the trustees approve of laying it out; that cannot be while the statute of mortmain is in force; it would be to act contrary to their trust. It was said the rule of construction, as to devises of money to be laid out in lands, is the same now as it was before the statute of mortmain; that is true. But suppose the trustees in this case would not act, the trust would devolve on the court, and the court would order the money to be placed in the funds, and not invested in lands. Sir J. Jekyll always did so before the statute. His lordship would not be understood to set up a different rule of construction of wills since the statute of mortmain, from what prevailed before; and this would, in his lordship's opinion, have been a sound rule before the statute.

Vide English v. Ord, 9 July 1754.

An observation arises on the face of the will; as if the testator had thought this bequest might continue on government security for ever. He directs the application of the *interest, profits, and rents* of the five 24ths, and of the 570*l.* or of the lands which should be purchased therewith. It being in the disjunctive seems to give an election: the words *for ever* are applicable to both alternatively. No mischief will follow from thence: this is a dif-

ferent sort of charity from those pretended ones the time of popery and monkery.

2 Nov. 1767, cor. Henley, C. S.
Attorney General v. Tancred,
 Amb. 351.
Higlm. on Mortmain, 148.

19. *C. T.* by deed in 1721 conveyed his estate to feoffees to the use of himself for life, remainder to his first and other sons in tail, remainder to certain officers of *Christ College, Cambridge*, to maintain certain students there, in the sciences of physic and divinity, and four students of the law at *Lincoln's Inn*, and also certain pensioners, viz. decayed merchants, soldiers, and clergymen, who should reside in his capital house at *Wichley*. By his will in 1746, duly executed, he confirmed this deed; but fearing the statute of mortmain of 9 *Geo. 2.* might defeat the uses thereof, he ordered that in case the said uses or any of them should be contrary to law, the estates so settled should go to the fellows and scholars of *Christ and Caius College*, to be divided in certain proportions for the augmentation of their stipends. On an information to establish this charity, at the relation of *Christ College* against the heirs at law, there arose two questions:

1st, Whether this was a conveyance to charitable uses under the statute of *Elizabeth*, and therefore to be aided in equity?

2^d, Whether it fell within the purview of the statute of mortmain 9 *Geo. 2.* and was therefore a void disposition?

Per Henley, C. S.—The conveyance of 1721 is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body, and therefore there is a want of persons to take in perpetual succession.

The only doubt is, whether the court should supply this defect for the benefit of the charity under the statute of *Elizabeth*? His lordship took the uniform rule of this court before, at, and after the statute of *Elizabeth* to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus the devises to corporations were void under the statute of *Hen. 8.* (a), yet they are always considered as good in equity, if given to charitable uses. There is here no doubt of *C. T.*'s power to convey, and the uses are truly charitable and truly proper in themselves, the education of poor scholars in the university, students at the inns of court, and poor persons in his own house; therefore, however un-

becomingly

(a) 34 & 35 Hen. 8. c. 5.

becomingly C. T. expressed himself in his will with respect to his relations (and indeed he seems to have cast off all natural affection), and however reluctant his lordship might be to establish a disposition made under his turn of mind, yet by the uniform course of precedents his lordship felt himself obliged to assist this conveyance; and more especially because it is the peculiar province of a court of equity to protect men in the freedom of disposing of their property, which is a point of the utmost importance in a trading country. This conveyance therefore being established under the statute of *Elizabeth*, the next consideration is, how it is affected by 9 *Geo.* 2.?

C. T. by his will made a disposition by way of substitution, "In case the dispositions are within the statute of mortmain, then to the fellows, &c. of the two colleges." The regulators admit, that part of the disposition is void with regard to the pensioners and law students; but then they contend, that the substitution must take place by reason of the exception of the universities and their colleges in the statute. The defendants (the heirs at law) contend that all is void, as well the substitution as the original uses, because the devise is not to the body corporate, but only to the particular fellows in their personal capacity. No cases have been cited on either side; an original construction must therefore be formed of this clause in the statute of mortmain, and his lordship's opinion was, first, that this is a devise for the benefit of the whole body corporate: secondly, had it not been so, he should still have thought that the legislature intended by the exception in the statute to save a devise for the benefit of particular members, as well as of the whole body. The legislature meant to except such devises as were really and *bona fide* for the benefit of colleges, not those in which the legal interest only passed to the college, in trust for other charitable uses, for then the statutes of mortmain might be defeated every day. And this devise is for the benefit of the whole society, even of the master himself, who must pass through a fellowship and partake of C. T.'s bounty in his progress towards the headship. Besides, in these houses of education any encouragement for youth to enter into a particu-

lar college, is a general benefit and profit to the whole society.

The legislature has thrown no restraint on these gifts, when made to the body corporate of either university, or to colleges already established there; intending not to increase the number of foundations, but to have those better endowed which are already established. They judged, that leaving this path open, would not for some time be liable to much inconvenience; but when they saw an inconvenience, they restrained even gifts to colleges. Livings are grantable to these bodies only till they amount in number to a moiety of the fellows; lest, if the succession be rendered too rapid, there should not be persons left of sufficient age, temper, and discretion to govern the society, and answer the great purposes of the foundation. This devise to the fellows and scholars contains no circumstances that intimate any intent to give them the estate in their *personal* capacities. It is clearly to them, as members of the body corporate, for the perpetual augmentation of the revenue of themselves and their successors.

Therefore his lordship decreed the disposition to the pensioners and law students void, under the statute of mortmain; but he established the exhibitions to the students in divinity and physic, and directed the substitution to take place for the benefit of the fellows and scholars of *Christ* and *Caius* colleges, in their corporate, not their natural capacities.

T. 1767, cor. Camden, C.
Harris v. Farnes and others,
Amb. 631.

20. Bequest of 200*l.* by Dr. *Canings* to be laid out in repairing the free chapel at *Grendon-Court*, part of his own estate, was held by Lord Chancellor *Camden* to be not within the words or meaning of the statute; the words are, "to be laid out in the purchase," &c. The meaning and intention was, to prevent increase of lands, &c. in mortmain, beyond what was so at the time the act was made. The legacy is only to support that which at the time of the will was in mortmain.

14 Dec. 1773, cor. Bathurst, C.
Brodie v. Duke of Clarendon,
1 Bro. Ch. Ca. 444. (n.)

21. *A. T.* having a considerable personal estate, by will in September 170 gave to trustees all her ready money, &c. subject to debts) to lay out in new-building a neat parsonage house, which her will was should be erected at the upper end of the garden belonging to the said parsonage-house, to be enjoyed by

§ 2. *What a good Devise or Appointment.*

C—a 41

by the incumbent for the time being, and testatrix appointed her nephew R. T. executor. S. F. becoming seised of the perpetual advowson, presented the plaintiff, who filed a bill against the representatives of R. T. to recover the residue of testatrix's personal estate, in order to build the said parsonage-house. The question was, Whether this bequest was within the statute of mortmain? Lord Chancellor decreed in favour of the charity, no land being to be purchased.

22. Money upon mortgage in *England* was given to a charity in *Ireland*; the executrix by her will affirmed the legacy. This was held to be an admission of assets of the testator, and not within the statute of mortmain.

P. 1783, cor. Lds. Comm.
Campbell v. Earl of Radnor,
1 Bro. Ch. Ca. 271.

23. Money given by will to be laid out in the purchase of heritable securities in *Scotland* for the use of a charity, held not to be within the statute of mortmain.

May 1784, cor. Thurlow, C.
Olipbant v. Hendrik,
1 Bro. Ch. Ca. 571.

24. Money left to repair parsonage-houses is not within the statute of mortmain, and the selection of objects must be made upon proposals laid before the Master. Referred accordingly.

H. 1785, cor. Thurlow, C.
*Attorney-General v. Bishop of
Chester*, 1 Bro. Ch. Ca. 444.
*Vide Attorney-General v. Bi-
shop of Oxon*, 13 July 1786, S.P.
Brodie v. Duke of Chandos,
14 Dec. 1773. *Attorney-General v. Hutchinson*, 26 May 1775.

25. T. W. by will dated 22d August 1754, (*int. alia*) gave to his executors 1000 l. to be applied to such charitable uses as he should by deed or will appoint, and in default thereof as his executors should appoint. By codicil dated 23d August 1755 testator directed his executors to lay out and dispose of all the rest, residue, and remainder of his personal estate to and for such charitable uses as they in their discretion should think fit, and in all other respects testator ratified his will. The will was only proved by Lady Stamford, who was the acting executrix. Upon a bill by testator's next of kin, in April 1792, for an account of his personal estate, defendant by his answer admitted the testator's will and codicil, and that Lady Stamford had kept a regular account of her executrixship, but conceiving that the residue was applicable to charitable purposes, she had applied the interest and part of the principal in building a charity-school called *Seaman's Moss School*, of the building of which she had also kept a correct account. On

H. 1793, cor. M. R.
Pickering v. Earl of Stamford,
4 Bro. Ch. Ca. 234.

Lady

Charity and Charitable Uses. § 2.

Lady S.'s death in *December 1772*. Defendant understood the management of the trusts, the application of which he stated, and he submitted to the court whether the bequests made by the testator's will ought at such a distance of time, and after the same had been applied to charity according to the will, to be called in question, and whether the debts, &c. ought not to be paid out of such part of the testator's personal estate as was invested in mortgages before any other part of the personal estate, so that a larger fund may be left to answer the charities? *Per* Master of the Rolls—The testator died in 1757, and the present bill was not filed till 1792. This, his Honor said, was almost ground enough to say there should be no decree. In a common case, certainly such a suit could not be sustained. Testator gave legacies to all his next of kin, and then he gave 1000*l.* to be applied to charities, and gave the residue absolutely to his executors. By the codicil he converted them into trustees. It was contended, that they were only converted into trustees *quoad* the charities, but his Honor thought that construction could not prevail: they were trustees to the whole property, a very considerable part of which was invested in real securities. The trustees, his Honor said, had acted faithfully, but plaintiff insisted, that it having been a few years since discovered that a large part was on real securities, the executors as to that part were trustees for the next of kin. It must be admitted, that a bequest of money on real security to a charity, is void in mortmain (a); therefore if the next of kin had made their claim recently after the death of the testator, it could not have been resisted. The only question is, Whether the demand was too late? His Honor said, courts of equity were certainly bound to set some limits to equitable demands, and to proceed by analogy to the practice of the courts of law, where payments of legacies and of bonds, and even judgments, is presumed from length of time. It has been said, no time will bar an equity, but that is not true unless in case of fraud. If parties were conscious of their rights, and lie by for a great length of time, and suffer other persons to act as if those rights did not exist, they could not be relieved. So in the case

(a) *Vide* Attorney-General v. Meyrick; 2 Vef. 44.

§ 2. *What a good Devise or Appointment.*

C—A 43

case of legacies, though there is no receipt it will be presumed they are paid (b). Therefore if the present was a clear right in the next of kin which they might have demanded at any time, they must be barred. It was argued, that there could be no presumption of a release, for that the parties were not apprised of the law, and that in this case there could be no such presumption, because it would be illegal. His Honor said, though it may be illegal to give money *secured by land* to a charity *by will*, it may be legally given in the lifetime of the donor; therefore it was not *absolutely* illegal. The question therefore was, Whether a presumption arose that the next of kin being apprised of their right, had permitted the trustees to apply the money to the uses of the charity? Such a presumption might be rebutted. Courts of law are more liberal now than formerly with respect to presumption (c). Upon an inquiry before the Master, facts, his Honor said, may appear which may put an end to the question; for it may appear, that all the next of kin did convey, and yet it would be hard upon them that they should lose their property because they knew not the law; but if such a bill as the present were to be entertained, half the charities in the kingdom might be overturned. His Honor said, that the case of *Smith v. Clay* (d) was strongly applicable to the present case in point of reasoning. The determinations upon the mortmain act with respect to mortgages, his Honor said were a great refinement (e). His Honor did not think himself warranted to dismiss the bill, though he wished he could lay down a rule which would enable him so to do, for there was great inconvenience from reasons of public policy in retaining such a bill. His Honor referred it to a Master to take an account of testator's personal estate come to the hands of his executors; to distinguish what part of it was secured by mortgage at the time of testator's death; and to inquire who were the existing personal representatives, and if any part of testator's personal estate had been applied in the charities directed by the will, and in what manner, and whether the next of kin had any notice of the will, and whether they received any legacy under it, or released their share of the residue, together with any special circumstances.

(b) *Jones v. Tuberville*, 4 Bro. Ch. Ca. 115.

(c) The question, How far the existence of deeds may be presumed, was fully gone into in *Read v. Brookman*, 3 Term Rep. 151. where it is laid down, that letters patent, bonds and judgments, may be presumed from length of time and enjoyment.

(d) Reported in the note to *Delarue v. Brown*, 3 Bro. Ch. Ca. 639.

(e) There is a great difference between the wording of the statute of mortmain and the property act of W 3., the construction of which is so fully gone into in *Roper v. Radcliffe*, 9 Mod 171. for in that act the words "charge" or "incumbrance," which are in the mortmain act, do not appear. In *Foone v. Blount*, Cowp 464. it was held, that a charge of debts was not such an interest in land as to be void as to a papist.

circumstances. The costs and all further directions were reserved till after the report.

H. 1794, cor. Loughb. C.
Attorney-General v. Williams,
4 Bro. Ch. Ca. 526.

26. *W. D.* by will in 1788 bequeathed 2800 *l.* stock to trustees in trust, to apply the dividends for and towards establishing a school in Cornwall. Upon a bill for the application of the trust funds to the purposes of the charity, the only question was, Whether this bequest was within the statute of mortmain? Lord Chancellor thought, that under this disposition he could not direct any part to be applied to the purchase of land or building, for that the master might teach in his own house or in the church, and therefore his lordship ordered a scheme to be laid before the Master, which should not include the application of any part of the dividends to the purchase or renting of land.

SEC. 3. Of such Devises to Charitable Uses as are void by the Statute of Mortmain; and in what Cases an Endowment of Money is considered so attached to the Gift, as to stand or fall with it.

H. 1741, cor. Hardwicke, C.
Attorney General v. Lord Weymouth & al. Amb. 20.

1. *SIR John James*, by will dated 15th May 1740, devised his freehold and copyhold estates to his executors, in trust to sell, and out of the produce (*int. alia*) to apply 1000 *l.* to be laid out by them as a fund for certain charitable uses which he forbore to mention, because they knew his designs as to charities. Testator then bequeathed all the monies to arise by sale of his real estates, and all rents and profits till the sale, and all his personal estate (subject to debts) to his said executors, in trust to pay one moiety to *Bethlem Hospital* for the benefit of incurables, and the other moiety to *St. George's Hospital*. The present information was filed at the relation of the charities against the heir at law of the testator, praying that the testator's estates might be sold, and the monies arising by such sale might be applied to the purposes directed by the will; that the defect of a surrender of the copyhold might be made good, and that the testator's whole estate might be so marshalled as best to answer

answer the purposes of the charities. Defendant pleaded the statute of mortmain (a), and by his answer set out his title as heir at law *ex parte materna*. Lord Chancellor said, there were two general considerations on the merits of this case, 1st, What is the true construction of the statute? and 2dly, What is the effect of the testator's will? It was insisted, that the only intention of the act was, what its title imports, *viz.* to restrain the disposition of lands, whereby they became unalienable; but his lordship thought that the title was no part of the act, and that it had often been so determined; nor ought the title to be taken into consideration in the construction of the present act, for originally there were no titles to the acts, but only a petition and the king's answer, and the judges thereupon drew up the act into form, and then added the title. The title does not pass the same forms as the rest of the act, only the speaker, after the act is passed, mentions the title and puts the question upon it, therefore the meaning of the present act must not be inferred from the title, but the act itself must be considered. It first takes notice, that gifts and alienations of land in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility, and then it proceeds, that nevertheless this public mischief has greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called *charitable*, to take place after their deaths to the disherison of their lawful heirs. The reason of the statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities which they paid no regard to in their lifetime, and therefore the act of parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and inrolled within six months after execution, though this would render them equally unalienable; but the legislature blended the two inconveniences together, the acts of languishing and dying persons, and the disherison of heirs. This being the general intention of the act, the provision of it is, "that from and after the 24th June 1736, no manors, lands, tenements, &c. nor any personal estate to be laid out in
" the

(a) 9 Geo. 2. c. 35.

Charity and Charitable Uses. § 3.

“ the purchase of lands, shall be given, granted, aliened, limited, released, assigned, and transferred, or appointed, or any ways conveyed, or settled upon any person for any estate or interest, or any ways charged or incumbered, &c. in trust, or for the benefit of any charitable uses whatsoever.” These words import, 1st, that it shall not be in the power of any person to convey the lands themselves; 2dly, that it shall not be in their power to charge or incumber them: and therefore it must be agreed, that no man can charge even 100 l. on any lands to any charitable use whatever; and the present case, his lordship said, was stronger, as the testator’s will gave the whole residue (subject to debts) to a charitable use. Not only the gifts of lands were made void by the act, but even any charge out of them. Then as to the second question, What was done by the will? Lord Chancellor thought the donation was both a devise of the land itself, and a gift of the money arising from the sale of the land, contrary to the prohibition of the act. It was a gift of the rents and profits till a sale, and how long it would be before a sale nobody could tell. No man had a right to compel the trustees to sell after payment of debts, but the charities, and a devise of the rents and profits, was a devise of the land itself. Then as to the devise of the money arising from the sale, his lordship did not think it necessary to the question to determine whether it was to be considered as a devise of land or money; but if the statute had not stood in the way, the person entitled to the residue might have gone into equity to have the land instead of money, and might have retained it as land, and the rather as the devise of the profits until sale had made him owner of the equity of the estates. This therefore was as strong a case as *Roper v. Ratcliffe* (b), but his lordship would not depend on that case, because it was the same thing whether the surplus was to be taken as money or land, and the statute of mortmain was stronger than 11 & 12 W. 3. against papists, for there the disability was upon the person taking, but here it was laid upon the person devising. The prohibition is, that no manors, &c. shall be given, &c. by any manner of words, or any ways charged or incumbered by any person whatsoever; and the subsequent clause makes void all charges and incumbrances for the benefit of the charity. If testator,

(b) 9 Mod. 190.

§ 3. What Devises void in Mortmain.

C—A

47

tator, instead of devising the surplus, had said, "I charge my real estate with 1000*l.* to a charity," it would have been void by the express words of the act: it would be absurd therefore to say, he might give his whole real estate to be turned into money for the benefit of a charity. Lord Chancellor said, it was impossible such a devise as the present could be maintained, and therefore his lordship allowed the plea.

On 5th February 1743, this cause and another against the same defendants, brought by the heir at law *ex parte paterna*, came on to be heard with respect to the charities and other matters, when Lord Hardwicke established testator's will, and directed the trusts to be performed, except as to the devise of the surplus of the real estates to charities, and declared, that if the personal estate was not sufficient to pay debts and legacies, &c. the legacy of 1000*l.* and the interest settled as a fund for charitable uses ought to be satisfied out of the personal estate, as far as the same would extend, and the residue of testator's debts and legacies ought to be raised out of the real estate, and decreed accordingly.

2. *J. M.* by will, dated 8th February 1734, devised particular lands and his personal estate to be laid out in lands to charitable uses. By codicil, dated 12th July 1736, testator declared, that if by the mortmain act his estates could not pass to those uses, he then devised them to *M. B.* and his heirs. By a second codicil of 17th March 1736-7, reciting that testator had been advised the devise of his land was void, he gave his personal estate to the same charitable uses, and his real estate to defendant *M. B.* The mortmain act passed in 1736, and the testator died on 8th February 1737-8. His Honor decreed the trusts of the will to be performed, but on appeal Lord Chancellor stated a case for the opinion of the court of *K. B.*, and the judges certified their opinion, that the estates were well devised by the second codicil to *M. B.* (a) Whereupon Lord Chancellor decreed in favour of *M. B.* accordingly.

31 July 1747, cor. Hardw. C.
on appeal from the Rolls.
Attorney-General v. Lloyd & al.
3 Atk. 551. 1 Ves. 32.

(a) *Vide* Ashburnham v. Bradshaw, 2 Atk. 36.

3. *Thomas Emerson* devised a copyhold estate to *Chopman*, he causing to be paid to his executors 1000*l.* and, after payment of debts and legacies, the

12 July 1748, cor. Hardw. C.
Arnold v. Chopman, 1 Ves. 108.
Case of the Foundling Hospital.

Charity and Charitable Uses. § 3.

the residue of all his estate freehold, copyhold, leasehold, plate, rings, stock, &c. he gave to the *Foundling Hospital*. The charity insisted that the assets should be marshalled, and the debts and legacies should be charged on the real estate, that the personal estate might go clear to the charity. The devisee of the copyhold insisted, that the 1000*l.* should not be raised at all; for that it was the same as if the condition was to pay to the charity, which was an unlawful act, that could not take effect, and therefore void, and the estate absolute. The next of kin insisted, that as by the statute of mortmain it was void as to the charity, and as the devisee could not take without performing the condition, it should go as part of his estate undisposed of, according to the statute of distributions.

Lord *Hardwicke* said, The *Foundling Hospital* is certainly a good and laudable charity, and should receive all possible encouragement; but the rules of law cannot be broke into, and laid down different for that, from all other hospitals in the kingdom. Had the testator devised the copyhold estate on condition to pay 1000*l.* to the governors it would have been void by the statute; he has taken another method, by including it in a residuary bequest, of real and personal estate; and it is said, that they can take, because by giving it to executors, he has made it part of his personal estate; and he may undoubtedly, if he pleases, turn it into personal estate, for lawful purposes. But here the act intervenes, which, if this was allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money to the charity. In the case of *James**, this was determined to amount to a devise of the land itself; because all charges, trusts, sums of money, &c. devised out of lands to a charity, are made void by the act. It is said the assets should be marshalled; and this case put, that since this act a man may say he charges his real estate with debts and legacies, and gives his personal estate to a charity; possibly that may do; but it would go a great way towards overturning this act; but as to that his lordship would give no opinion, for there an intention appears in the testator; here no exoneration is intended by the will. As to the rule of the court of marshalling assets, his lordship said, he must take it to be the same as it was before the statute; and if 1000*l.* was devised and debts charged on
real

* Attorney-General v. Lord Weymouth, Amb. 20.

real and personal estate, the rule before the statute was, that the debts should be paid out of the real estate, and the legatees should come on the personal. The court will do the same now, not by way of standing in the place of creditors, but by turning the debts on the real estate. But that is no rule where real and personal is charged, and the residue given to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee. In case of papists, the court would not do for them what it would not do for any one else: and this is a stronger case than that. In *Roper v. Ratcliffe* it was resolved, that whatever is taken out of the real estate shall be considered as real; and this would be taking out so much of the real, for the charity, which therefore shall not go to it. The legacy was decreed to the heir at law, and not to the devisee, because it was well made on the real estate, but not well disposed of, by reason of the act.

Vide Duke of Beaufort's case,

4. *H. W.* by will, dated 13th December 1734, devised the bulk of his estate to trustees on certain trusts, and particular lands to charitable uses. The act passed in 1736, and in 1744 by codicil he added new trustees, and confirmed his will. The devise to the charity was held void, for the republication of the will by the codicil after the act, rendered the devise clearly within the statute.

12 Dec. 1748, cor. Hardw. C.
Willett v. Sandford, 1 Ves. 178.
In *Attorney-General v. Andrews*, 1 Ves. 225. a devise of copyhold lands not surrendered to the use of a will made before the statute was held good, as not within the last mortmain act, on the principles of the cases of *Ashburnham v. Bradshaw*, 2 Atk. 36. and *Attorney-General v. Lloyd*, 1 Ves. 33.

5. A devise of money to be laid out in land for an annuity to a minister to preach an annual sermon, and keep a tomb-stone and inscription in repair, and to a corporation for keeping the account, held a charitable use, and void by the statute.

21 Nov. 1749, cor. Hardw. C.
Durour v. Mouteux, 1 Ves. 321.
Vide Attorney-General v. Day, 1 Ves. 218.

6. Testator (a mortgagee in fee in possession under an *habere facias possessionem* without foreclosure) by will, dated 24th April 1744, devised all the money due to him on that mortgage to a charity and died in possession. Upon a bill for establishing the charity the question was, Whether this devise was good within the statute of mortmain? Master of the Rolls said, he would first inquire what interest passed by testator's will on its natural construction; and secondly, if it came within the act on account of the right which passed? First, testator had the legal as well as the

6 Nov. 1750, cor. M. R.
Attorney-General v. Meyrick, 2 Ves. 44.

equitable estate in the premises mortgaged. It was contended on the part of the relator, that mortgages being considered in equity as personal estate, and the money only being devised, the heir of the testator to whom the legal estate descended was only a trustee for the charity. But his Honor said, this distinction between a devise of the land and of the money is without foundation; for if a man gives all his mortgages to A., all the interest which the testator had in the mortgages passes, and the executor, if the mortgage was for years, and the heir, if in fee, would be trustee for A. If such be the case on a general devise, so it would be when the words made use of are "money due on mortgage." The present case was properly compared to the devise of the rents and profits of land, by which the land itself would pass. The devise was to the trustees, which must pass the legal inheritance, or if not, the heir was a trustee. His Honor thought the devise would pass all the estate and interest. Secondly, the question whether the mortmain act prohibited such devises, depended on the reason of that statute, and the construction of its several clauses. Upon that act as being a remedial law, the court ought to put such a construction as would repel the mischief and advance the remedy. The devise in the present case came both within the words and the plain intent of the act. The intent was to prevent lands coming by any means into hands where they would be unalienable. The first prohibition is absolute as to real estates, but leaving men at liberty as to personal; the next circumscribes personal estate, and restrains gifts of money to be laid out in land. It goes farther, money due on mortgage affecting land, and the payment depending on the pleasure or ability of the mortgagor. The third clause of the act has therefore provided to take in the very case of mortgages; it says, "that shall not be given which is or may be a charge on lands." His Honor supposed a sum devised to be laid out in mortgage of lands; that would be within the very words of the second clause (a). In the cases upon the 11 & 12 W. 3. against papists, the court had made a liberal construction to prevent the mischief. The information was dismissed, but as a new case, without costs.

(a) On the authority of this decision, in a case in 1776, (Attorney-General v. Martin,) where there was a bequest of a general residue of personal estate to a charity such as the executors should appoint, and great part of the personal estate consisting of mortgages, Lord Bathurst held, that the bequest was void as to those mortgages, and that the next of kin should have them as undisposed of; but that the debts, &c. should be paid thereout as being undisposed of; which last part was agreeable to a determination of Ld. Hardwicke in Attorney-General v. Tomkins, Ambler 216. *Vide* also Highmore on Mortmain, 91 to 97.

26 Nov. 1770, cor. Hardw. C.
Mogg v. Hodge, 2 Ves. 32.

7. *Jane Churchill* directed her real estates to be sold, and her debts and legacies to be paid out of her

§ 3. *What Devises void in Mortmain.*

C—

31

her personal estate, and residue to her trustees, to be distributed in charities as they should think proper, particularly recommending to them the hospital at Bath. The trustees agreed that all money arising from a real estate is to be accounted as real, the bequest was so far void by 9 Geo. 2. but desired, that in compliance with the intent of the testatrix the assets should be so marshalled, that all the other legacies should be paid out of the real estates, and so the personal go to the charity. Lord Chancellor said, this is contrary to the express direction of the testatrix, who desires first that her legacies and debts should be paid out of the personal. In *Dalton v. James*, the debts and legacies were charged on both estates; but the assets cannot be so marshalled as to support a legacy contrary to law. *Decreed*, that the trust must either take effect according to the whole intent, or not at all; and as all money arising from the sale of a real estate, was still to be accounted as real; so all lands to be bought with personal, were still to be considered as personal. *En relatione.*

In this case it was argued that the hospital at Bath, which was incorporated by parliament, had some particular clauses in it contrary to the statute of mortmain, and consequently in those particulars not subject thereto. But Lord Chancellor said, that the words in that act were to be considered as in a charter; that the charter of incorporation was only granted by parliament to avoid expence to the promoters of that charity, who were forced to apply to parliament for some other powers which the crown could not grant, therefore the charter was inserted in the act, and is to

be construed as any other charter given by the king only. The clause mentioned was inserted to avoid the trouble of applying for a licence in mortmain, and was considered as such a licence; that the governors are thereby empowered to take lands to such a value, but still with a proviso that they are granted to them in the manner prescribed by that law.

8. *J. A.* devised all the residue of his real and personal estate to the defendant for life, and if she should die without issue, then she might dispose of 500*l.* by deed or will, and in default of her appointment, testator directed his trustees to erect in some convenient place in or near the city of York, an hospital for the support and maintenance of as many poor old men as the surplus of his estate and effects would admit of. Plaintiff, as heir at law and next of kin of the testator, (without trying the validity of the will,) brought his bill to have the benefit of the charities devised contrary to the statute of mortmain. *Per* Lord Chancellor—As the plaintiff declines trying the will at law, there is nothing to determine upon in this case but the construction. His lordship said, the remainder over of the real estate to the charity was void, and the reversion in fee would take place in the plaintiff; but as to the residue of the personal estate, the charity must be supported. No specific legacy in this case was given; nothing but the residue, and that only implied the balance after payment of

26 Feb. 1751, cor. Hardw. C.
Vaughan v. Farrer, 2 *Ves.* 132.

debts, &c. On the part of the plaintiff it was objected, that this residue was given in fact to buy land contrary to the statute, and that before the statute the court would not have made any other construction of it, but Lord Chancellor thought it was not then nor ought it since to be a necessary construction. His lordship said, the construction of the clause in this case came very near the case of a school; for a school imports that there should be some place where the children should be taught. So does an hospital import some place in which poor people should be entertained. There was no direction in the will that any part of this money should be laid out in building an hospital, for "erect" imports foundation as well as building, and it was so construed in the case of a school (a). So is *erigimus* in charters of the crown and private foundations. Lord Chancellor was of opinion the court could not lay down a different rule of law or equity in respect of the rights of the parties to take a case out of the statute, but that he said was a very different thing from the manner of executing a charity. The carrying the directions of a will for performance of a charity into execution, is different from the other. Before the statute the court at pleasure could have directed the money to be laid out in land or in the funds, and the court did then frequently lay out money given to a perpetual charity, in the funds, and not in land, where (as in this case) the will did not direct it otherwise. Sir Joseph Jekyll had done it, for he took it to be in the discretion of the court, and the court had done it since in the case of money given or collected in a person's life to a charity, which there is no restraint in the statute from laying out in land, notwithstanding that the court sees this goes near to the mischief intended to be remedied by the statute, that the court will not direct it to be laid out in land but in the funds. As therefore the will in this case has not directed the money to be laid out in land, the court ought to lay it out in the funds, since the statute has given directions inclining to that mode. There is nothing in the statute prohibiting the gift of personal estate to a charity, if it is not to be laid out in land, and the words of the statute are applied to improvident alienations in disinheritance of heirs. If a large personal estate is left to trustees for a charitable use

which

which they direct, and there is no occasion to come into a court of equity for directions, there is nothing in the statute restraining the trustees from laying out that in land, because by the express proviso, all purchasers to take effect in possession are good notwithstanding the statute, which is a matter may perhaps want a remedy. His lordship said, if the trustees were to come into equity for an establishment, he would never direct it to be so laid out in land; and said, he had been of that opinion in every cause before him, and should ever continue so; but there was nothing illegal disabling the trustees from privately doing it*. It was said, two purposes were to be answered; 1st, erecting; 2d, maintenance of the persons. If the court should take it in the latitude his lordship did as to the endowment and provision for the poor, that may be answered by putting out the money in the funds; yet the hospital cannot be without a building, and land should be bought for that, and the plaintiff ought to have the benefit of so much as the Master should think the value. His lordship wished he could come at that for the plaintiff, who was a greater object than any who might come into the hospital; and he lamented the plaintiff's situation, yet he said he must go according to such rules as would hold in other cases. Suppose this had happened before the statute, would it have been of necessity any part of the money should have been laid out in land to build an hospital? If the trustees had laid a scheme before the court, that certain persons would give a piece of land to build upon, it might have been done†, the court would have accepted it; or if they had said, there were several charitable foundations in *York*, and they would let them build thereon for this charity, the court would have accepted that: nay, if they should take a house in *York*, there is nothing in the statute to restrain giving money to build. It is lawful to give money to build a church. Suppose the universities had been under the same disability, money might notwithstanding be given to erect a chapel or hall, or add a building to a college; that may be done at once, it locks up no more land. One may give money to add to the buildings of any hospital in *London*. Nothing in the statute, said Lord H., restrained testator from doing what he had done with

* *Vide* 9 Geo. 2. c. 36. s. 1. which makes good all purchases, &c.

† *Vide* Attorney-General v. Tyndall, Anbl. 614. Attorney-General v. O'wies, 3 Atk. 806. 2 Vef. 547. Attorney-General v. Whitchurch, 3 Vef. jun. 241.

his personal estate; it was a mere surplus given to the founding an hospital in which the trustees could not lay out money to purchase land, but they might hire a house in *York*, or by permission build on a common piece of ground belonging to the city, which would be for the city's benefit. The statute meant to leave persons to dispose of personal estate for a perpetual charity, but meant to prevent the great mischief of giving land for that, or money to be laid out in land, as that would lock up land from being used in a commercial way, which would be detrimental to the public. The clause of the purchasers in the statute, his lordship said, he very well knew was put in relative to Queen *Anne's* bounty, and whether that may want a remedy hereafter may be a question.

Bill dismissed, but without costs.

Lord *H.* observed, that the legal estate is made void by the statute, which operates like the popery acts.

M. 1752, cor. Hardwicke, C. Attorney-General v. Graves, Amb. 155.

Vide Highm. on Mortm. 95. S. C. stated differently, though same determination.

Vide Attorney-General v. Tomkyns, Ambj. 216.

9. Devise of a residue of real and personal estate to charitable uses. Part of the residue consisted of a term not carved out of the inheritance by the testator, but vested in him as lessee. The question was, Whether this was within 9 *Geo. 2. c. 36.* Lord *Hardwicke* was clear it was both within the intention and words of the statute; his lordship would not construe the statute by the chicane with which the former statutes of mortmain have been construed; it was a reproach to the laws, and prevented their effect. The old statutes were armed against a public mischief in a narrow view; trade and commerce were not then introduced; the realm was defended by military tenure, and they prevented estates getting into ecclesiastical hands. Afterwards, when commerce was extended, the locking up of lands became of greater consequence; and therefore it would be too narrow a construction to say the statute only meant devises to the disinheritance of heirs. It takes in money to be laid out in land, which does not disinherit heirs. The words of the enacting clause, his lordship said, were as strong as possible; the annulling clause must not be extended farther than the enacting clause, but it explains the other.

It was argued that a lease coming from another was personal estate, and that the lessee might dispose

§ 3. *What Devises void in Mortmain*

pose of it as he would to charitable uses, and the statute of wills was cited as an authority, which does not extend to terms of years, because it begins "if any person having or being seised of manors," &c. and that made the great question in Sir Owen Buckingham's case, where Lord Holt observed on the word *having*—The statute of frauds (a) was also cited; that takes notice of all lands, &c. devisable by the statute of wills, by that statute, or the custom of Kent, which shews that only freeholds of inheritance are within it; for terms of years are not within the statute of wills or devisable by custom. The words of the statute "*any estate or interest whatsoever*" were insisted to mean only, that a person should not devise *his own land* for any estate or interest whatsoever. His lordship said, there was no colour for that construction, for that these words related back as well to lands and tenements as to personal estate. The annulling clause which affords a construction on the other annuls all estate or interest in lands and tenements, and there is no reason for that distinction on those latter words. It might as well be said that the words "*nor any sums of money*," &c. do not relate to money which the devisor had of his own, but only to money directed to be laid out by some other person, and which the devisor took. *Inst.* 2. on statute of mortmain makes strongest against this mode of arguing. The judges vigorously set out on *Magna Charta*. It was determined that fees only were within it, and that long leases were not. Feigned recoveries and terms occasioned the statute of *Westminster* 2. that was the original of common recoveries. It appears by the recital in the statute of 9 *Geo.* 2. that the legislature had all this in view at the making of it. Some inconveniences may arise on the construction either way, but by the other all terms, long or short, are not within the statute; consequently property is locked up. His lordship said, all leases held of colleges would become charitable uses. As to the devise of the surplus, part personal and part real, a mixt mass, where every thing is ordered to be sold to pay debts, and the rest to charitable uses, Lord Chancellor would not say it would be void as to the charity. The statutes, his lordship said, do not prevent charity, but the abuse of it.

(a) 29 Car. 2. c. 3.

See the statute.

In-Attorney-General. *Meyricke*, 2 Vef. 44. a mortgage in fee was held to be within the statute.

14 Mar. 1754, cor. Hardw. C.
Attorney-General v. Tomkins,
 Ambl. 216.

9 July 1754, cor. M. R.
English v. Orde, MS. Ca. printed
 in *Higbm. on Mortmain*, 82.

• Ambl. 210.

Vide Vaughan v. Farrer,
 2 Vef. 182.

24 July 1754, cor. Hardw. C.
Attorney-General v. Bowles & al.
 3 Ash. 806. 2 Vef. 547.

(a) *Vide Attorney-General v.*
Meyricke, 2 Vef. 44. *Attorney-*
General v. Caldwell, Ambl. 635.

(b) *Vide Vaughan v. Farrer*,
 2 Vef. 182. *Attorney-General*
v. Hyde, Ambl. 751. *Attorney-*
General v. Nash, 3 Bro. Ch. Ca.
 388.

Charity and Charitable Uses. § 3

10. A devise of a residue of real and personal estate to a charity is void as to such part of the residue as is leasehold; it having been determined on the statute of mortmain that the words "any estate or interest" in lands extend to leasehold; and it is so resolved on the statute against papists.

11. *John English*, 14th January 1753, made his will, and gave his debts, securities, and ready money, to trustees, in trust, until they could meet with a purchase of lands, and should actually purchase the same, to pay the interest of 120*l.* to and among such poor and necessitous persons, inhabitants in the town of *H.* as his executors should think proper objects of charity; and willed that the trustees, as soon as they could meet with a suitable purchase, should lay out 120*l.* in the purchase of an absolute estate of inheritance in fee-simple of messuages, lands, &c. to be conveyed and assured and vested in trustees for ever, in trust to pay and apply all the rents, &c. Master of the Rolls said, that Lord Chancellor declared, that he did not think the case of *Grimmett and Grimmett* clear; and that, if there had been express words of direction to trustees to invest, &c. it would be within the statute. He was of opinion that the second clause was directory, and not discretionary; he was not for carrying the case further than *Grimmett's*, and decreed the devise void.

12. *W. B.* by will, in 1745, gave 500*l.* out of his personal estate to trustees to be laid out, part in erecting a small school-house and a little house adjoining for the master, the whole purchase and building not to exceed 200*l.* and the remaining 300*l.* to be laid out in the purchase of land, or in some real security, for the maintenance of the master. Lord Hardwicke held, that the word *real* (a) must be taken in its known legal signification; therefore all that 300*l.* legacy was void by the statute of mortmain. But as to the 200*l.*, if they could get a piece of ground by the gift or generosity of any person, *not by purchase*, they might be at liberty to apply to the court, to lay out that 200*l.* in erecting a school-house thereon, when the trustees could lay a proposal before the court; *but not to be laid out in land to build upon*; and the proposal was to be given in a certain time (b).

In *Attorney-General v. Tyndall*, Amb. 614. Lord Northington took a review of the principal cases, and very much questioned it. His lordship said, that it was contrary to the spirit of the statute; it was paying out money in land—it improved the site, was demandable in a price, and was a purchase of so much realty, it was opening a door to avoid the statute.

In *Attorney-General v. Whitechurch*, 3 Ves. jun. 141. Sir R. P. Arden, M. R. wholly shook the authority of the principal case, as to that part of it where, admitting that the object was to erect a building on land not then given, Lord Hardwicke threw out, that if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it. *Vide post.*

13. *Thomas Munday*, rector of *Biston*, gave two pecuniary legacies to trustees, to be laid out in building a parsonage-house. *Clarke*, M. R. held, This was not within the words or meaning of the statute. The statute was meant to prevent new acquisitions in mortmain; erecting a building was not to be considered as such. Suppose the testator had not made such a devise, he might have been sued for dilapidation, and the money recovered would have been laid out upon the building. Decreed the money to be laid out.

30 May 1759, cor. M. R.
Glubb and another v. Attorney-General and others, Amb. 373.

Vide Attorney-General v. Tyndall, Amb. 614. *Attorney-General v. Downing*, Amb. 350.

14. A lease for years, held under the crown, of the right of laying mooring chains in the river *Thames*, was devised to a charity. Sir *Thomas Clarke*, M. R. said, This was clearly a franchise; like a market, which may be in other persons than the owner of the soil; that made it unnecessary to consider to whom the right of the soil belonged. It was an inheritance vested in the crown, and granted out for years; the rent was reserved to the king, his heirs and successors, payable at the Exchequer. This puts an end to the only question made on the behalf of the charity, that it was no part of the land. The chains being moveable make this franchise no more personal than fairs or markets are. It was a grant of an interest in the inheritance (a).

30 May 1759, cor. M. R.
Negus v. Coulter, Amb. 367.

(a) In *Hall v. Grey Coat Hospital*, in 1747, Fortescue, M. R. thought a mortgage in fee within the statute of mortmain; and in *Attorney-General v. Meyrick, Strange*, M. R. considered a mortgage in fee to be an interest in the land.

The reporter says, *Quere* if a grant of tolls is distinguishable from markets?

15. *M. P.* in 1754, devised all her messuages, &c. whereof she was seised in fee, and all her leases, &c. to *J. S.* in trust to sell, and with the produce to purchase ground for building and furnishing an alms-house not exceeding 1400 *l.* and to lay out the remainder in the purchase of lands, and out of the rents and profits thereof to pay twenty poor persons a weekly allowance; and till such purchase should be made, the money to be placed out at interest, and the dividends to be applied in accumulating the capital; and if her intention, as expressed, could not take effect by law, then she gave the purchase-money to the trustees for

4 Mar. 1764, cor. Henley, C.
Attorney-General v. Tyndall, Amb. 614.

In *Makeham v. Hooper*, 4 Bro. Ch. Ca. 153. Mr. Attorney-General said, this case was more fully reported in Highm. on Mortmain 106. than in Ambler.

for the same charitable purposes as near as could be, and the law would admit of. And she gave all the residue of her personal estate to the trustees to be disposed of to the aforesaid charities.

By a decree at the Rolls in 1759, the devise of the freehold and leasehold was declared void, and an account of the personal estate was directed. The Master made his report, and on 24 June 1761 an order was made on a hearing for further directions, when it was declared, that if they could, in the space of two years, obtain a piece of ground by gift (a), the mere personal legacy would be good; and the debts to be paid out of the leasehold estates, &c. and also the legacies and costs.

From this order defendants appealed to the Lord Chancellor.

Per Lord Chancellor—As to the freehold, there is no doubt but it must go to the heir at law. The only question respects the leasehold, which, by reason of the devise being void, falls into the residuum. *Quere*, then, Whether the court shall marshal the assets, and by applying the leasehold in the first place to payment of debts, leave the other assets to be applied to the charity, and by that means do *per obliquum* what *per directum* could not be done? The old rule of marshalling (b) was where a person had a double fund to resort to, and another person had a demand upon one of those funds, the court had turned the person having the double security upon that fund which was not liable to the other person's demand, in order to leave that fund open which was. That was attended with no inconvenience to any person, and it effectuated the intention; but this would be a method to elude the statute which Lord Chancellor would not do. With respect to the building of an alms-house, if the trustees could have ground given them (c). His Honor had decreed, on the authority of *Attorney-General v. Bowles*; but Lord Chancellor said, he felt only one authority, and that was the House of Lords. His lordship looked on that case as contrary to the spirit of the statute, and as opening a door to avoid it. In this case the building was to be erected on ground purchased with testatrix's own money. To make her go begging for ground was contrary to her intention, therefore it was departing from the will to do an illegal thing. The two propositions in the statute were very clear; not to give land to charity; not to

realise

(a) *Vide Attorney-General v. Bowles*, 3 Atk. 806. 2 Vef. 347. on the authority of which his Honor made this order.

(b) *Vide Attorney-General v. Tomkins*, Ambler. 216.

(c) *Vide Attorney-General v. Whitchurch*, 3 Vef. jun. 141. to this point particularly.

Vide Lord Hardwicke's reasoning in Vaughan v. Ferrer, 2 Vef. 189.

Lord Chancellor, in *Attorney-General v. Downing*, Ambler. 550. 571. said, that the foundation of

realise for the benefit of a charity. If the doctrine of *Attorney-General v. Bowles* was to prevail, land not worth 50*l.* might become worth 20,000*l.* As to the residue of the personal estate, Lord Chancellor held it void, as it appeared intended to be laid out in land; though before the statute the court would have directed the residue to be laid out in land. In *Soresby v. Hollings* the original intent was to lay out the money legally in land or otherwise; in this case it was to be laid out in land. The trustees cannot depart from the original intention, nor were they permitted to say the money should continue on securities. The clause that the trustees should lay out the money as near to the intention of the testatrix as the law would permit was fraudulent and void: it was inserted to intimidate the heir at law and next of kin, and to prevent their opposing the charity. Lord Chancellor said, he greatly approved of the statute, and would support the spirit of it fairly, and without any chicanery to get rid of it.

Lord Chancellor reversed his Honor's decree except as to costs, the account and securities of the money arising from the leaseholds, and decreed the surplus to be distributed according to the statute.

16. *R. H.* made his will in December 1734 before the late statute of mortmain, and devised all the residue of his personal estate to be laid out in land, and settled to certain charitable uses. After the statute he made a codicil, dated in July 1739, and thereby, after giving a few legacies, he confirmed his will and died. Upon an information to have the residue of the personal estate applied according to the directions of the will, a question arose, Whether the devise was void by the statute of mortmain? On the part of the information the question was treated as a settled point; and the cases of *Alsburnham v. Bradshaw* (a), and *Willet v. Sandford* (b), were cited; but Lord Chancellor made a distinction between those cases and the present. His lordship said, the statute of mortmain differed from the statute against papists; for in the latter the devise was defeated by the incapacity of the persons to take (c). The line is to be drawn at the death. The thing does not exist till then. He might or might not have any personal estate at the time of the will. If it had rested on this

his opinion in the principal case was, that the testatrix had directed the ground to be bought, and that it did not contradict the determination in *Attorney-General v. Bowles*.

In *Soresby v. Hollings*, 9 Mod. 221. and *Grimmett v. Grimmett*, Amb. 210. the devises are disjunctive in land or money or to the satisfaction of the trustees. Suppose the money had been directed to be laid out in land, and till a purchase could be found, to be at interest; might not the trustees decline laying it out in land, and so avoid the law? In the principal case the original intent was to have land, therefore it could not be good; but it would have been good if an election had been originally given of land or money. *Highmore on Mortmain*, 109.

18 July 1764, cor. Hardw. C. *Attorney-General v. Heartwell*, Amb. 453.

(a) 2 Atk. 36.

(b) 1 Vef. 172.

(c) *Mog v. Bath Hospital*, 2 Vef. 52.

this merely, it would be within the statute. But here the codicil alters the residuum, and *quoad* the personalty makes a new will. It confirms the will, and consequently makes a new publication of it. His lordship declared that so much of the will as related to the residue of the personal estate was void by the statute of mortmain.

26 Nov. 1764, cor. Northington, C.

Jackson and another v. Hurlock,
Ambl. 487.

Vide Gravenor v. Hallum,
Ambl. 643.

11 Dec. 1764, Canc.

Peibam v. Anderson,

3 Bro. Ch. Co. 444. (n.)

M. 1766, cor M. R.

Attorney-General v. Caldwell,
Ambl. 635.

17. Testator devised land charged with the payment of charitable and superstitious legacies, which were void by the statute of mortmain; held they should sink into the estate for the benefit of the devisee.

18. Testator directed his executors should build and erect an hospital, for which purpose he charged his personal estate with 2000*l.*; residue to the same uses as his real estate. The bequest of 2000*l.* was declared void by the statute of mortmain.

19. In this case the bequest was general, "that the remainder of all the testator's effects, annuities, mortgages, bonds, or notes, with furniture, &c. be sold, and what money they should sell for, he gave to two charity-schools for boys and girls of *St. Andrew, Holborn*, in equal moieties." The mortgages were for years.

Two questions arose: 1st, Whether the bequest, so far as related to the mortgages, was void by the statute of mortmain?

2d, Whether the court would not marshal the assets, and apply the mortgages in the first place to pay the debts, in order to leave the larger fund for the charity?

(a) *Vide Hall v. Governors of Grey Coat Hospital. Attorney-General v. Meyrick.*

(b) *Attorney-General v. Graves* is an authority that a term in gross is within the description of the statute.

(c) *Attorney-General v. Graves*
Attorney-General v. Tyndall.

Master of the Rolls was clear upon the first question, that the bequest was void. The mortgages upon which the court had given judgment were mortgages in fee (a), and the present was only a mortgage for years; but that made no difference, for it was an interest in land (b).

Upon the second question, his Honor distinguished between the case where a mortgage was given as a specific bequest, and where it passed by the residuary bequest enumerated and described amongst the different species of estates, of which the residue consisted; in the former case, it could not be first applied to pay debts, but in the latter it might (c).

His

§ 3. *What Devises void in Mortmain.*

C-a 61

His Honor gave directions accordingly, that the mortgages should be first applied (d).

arranging the

(d) Mr. Ambler says, this is not properly marshalling assets, but different species of personal estate.

20. *Richard Widmore* gave to the corporation of *Queen Anne's* bounty 200 l. to augment some poor vicarage in *Bucks* or *Southampton*, and gave one third part of the residue of his personal estate "to some public charity," declaring his preference of those for augmentation of poor vicarages, or the propagation of the Gospel; another third part he gave to be distributed among the most necessitous of his relations by the father and mother's side, and the remaining third part he gave to some public charity, and appointed plaintiffs his executors, and died leaving defendant the only next of kin on both sides, being the only child of testator's sister. Two questions were made by the next of kin:

1st, Whether the legacy to *Queen Anne's* bounty was not within the statute of mortmain, as the governors were bound, by their own rules, to lay it out in the purchase of land?

2d, Whether the next of kin was not entitled to the third part of the residue given to the most necessitous of his relations by the father and mother's side?

M. 1766, cor. Camden, C.
Widmore v. Corporation of Queen Anne's Bounty, (nomine *Widmore v. Woodruffe*), *Ambler* 636.
1 *Eq. Abr.* 96. 1 *Bro. Ch. Ca.* 13. (a.)

Vide Roach v. Hammond, *Pres.* in Ch. 401. *Thomas v. Hole*, *Ca. temp. Talb.* 251. *Carr v. Bedford*, 2 Ch. Rep. 146. *Griffith v. Jones*, *Isaac v. Defries*, *Ambler* 595. *Brunsdon v. Woolridge*, cor. M. R. 1765.

Lord *Camden* declared the legacy to the corporation could not be supported. The charter of rules reserves a power to the crown to alter, vary, and make new laws. These were in force at the testator's death, when the legacy was to take place. By the 13th rule donations not given under particular directions are to go as the general fund. It was argued that the word *purchase* was not to be confined to purchase of lands only. But his lordship held he was to take it in the sense the crown did when the rule was made. The word *purchase* was put in opposition to *pension*. The 16th rule is decisive: it directs the money to be laid out in the public funds or securities, till laid out in purchase. Quere, then, Whether there were any particular directions in this case? It was argued, That considering the statute of mortmain, the court may collect a particular direction from intention that it should be laid out so as not to fall within the statute. Though the mortmain statute has made considerable alterations, yet Lord *Camden* did not understand it was made to prevent charities: he could

could not consider it as given under a special direction, without adding many words to the will, which could not be done. If there could be a general bequest to the corporation this is one, except as to the counties in which the augmentation is to be made. The testator seems to have known the rules of the society in case of a donation of 200*l.*, by adding another to it; and thence Lord Chancellor collected his intention that the legacy should be laid out in land.

As to the point, Whether the court should adjourn the cause till new regulations were made? Lord Chancellor had no doubt but the crown may alter and make new laws; but they cannot have any retrospect. The legacy must vest at the death of the testator, or be void at that time and the right vest in another.

Upon the second question, several cases were cited, all proceeding upon the same ground, making the statute of distributions the rule to prevent an inquiry, which would be infinite, and would extend to relations *ad infinitum*. The court cannot stop at any other line. Thus it would clearly stand on the word "*relations*" only, the word "*poor*" being added, makes no difference. There is no distinguishing between the degrees of poverty, and therefore the court has, as was unanswerably argued, construed the will as if the word *poor* was not in it.

T. 1767, cor. Camden, C.
Jones v. Williams, Amb. 651.

21. *J. W.* by his will gave 1000*l.* to arise by sale of his real estate, for the purpose of bringing spring water from *Saint Arvan's*, or elsewhere to *Chepstow*, for the use of the inhabitants for ever.

Lord Chancellor—The definition of charity is a gift to a general public use, which extends to the poor as well as to the rich; and there are many instances in the statute 43 of *Eliz.* carrying this idea as far as building bridges, &c. the supplying water is necessary as well as convenient for the poor and the rich; and on these grounds his lordship declared the legacy within the statute of mortmain, and void.

26 May 1775, cor. Bathurst, C.
Attorney-General v. Hutchinson,
1 Bro. Ch. Ca. 444 (n.)
Case of Roydon Free School,
Amb. 751. S. C. nomine *Attorney-General v. Hyde*.

22. *M. G.* by will in 1761 directed that 1500*l.* should be forthwith paid and laid out under the direction of the minister and churchwardens of *R.* for erecting and building a free school at *R.* for twelve poor boys and twelve poor girls of the parish; and the

3. *What Devises void in Mortmain.*

The directed, that as soon as the school should be built 2000 *l.* should be placed out at interest and the dividends paid to the minister and churchwardens for ever, for the purposes following, viz. 30 *l.* per ann. to be paid for a schoolmaster, and 30 *l.* per ann. to be paid for a schoolmistress to teach and instruct the said boys and girls in reading, writing, and plain work, until they should be of age to be apprenticed: the surplus interest testatrix directed should be applied to repair the school, &c. and made defendants executors. On a bill being filed defendants contended that testatrix having given the 2500 *l.* to be laid out in building a school, and the 2000 *l.* being dependent upon it, the whole was void. Lord Chancellor dismissed the information as to the 1500 *l.* for building the school, the testatrix not having pointed by the will to the land which the parish had, and there being no ground to presume she meant it; and if the school which was there already was given by the lord of the manor, it was not to be converted to other purposes.

Directions in a will to erect a school-house import an intention to purchase; but where land is already in mortmain, there is no room for such a presumption, &c. a devise of money to repair or build upon land already dedicated to the same use is *not within the statute*, and that was the ground of the determination in *Brodie v. Duke of Chandos*, 1 Bro. Ch. Ca. 444. (n.)

Vide Ld. Thurlow's comments on this case in *Attorney-General v. Nash*, 3 Bro. Ch. Ca. 582.

Lord Chancellor said, this case was new in respect there was a piece of waste ground belonging to the parish whereon the school-house might be built. Lord Hardwicke's determination in *Attorney-General v. Bowles* was certainly over-ruled by Lord Northington in *Attorney-General v. Tyndall*, which had been followed by several others. Di-

23. Devise of land in remainder to a body corporate in trust for the testator's nephews and nieces, and their child or children, &c. *Per curiam*—Although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. Upon this ground courts of equity have decreed in cases where no trustee is named. Decreed the heir at law is a trustee to the uses of the will.

T. 1780, cor. Eyre, B. abf. C. *Sonley & al. v. Clockmakers' Company*, 1 Bro. Ch. Ca. 81.

24. The information stated, that by a private act the parishes of M. and O. were united, and the wardens of the poor were incorporated.

12 Dec. 1788, cor. Buller J. abf. C. *Attorney-General v. Goulding*, 2 Bro. Ch. Ca. 428.

H. A. was seised in fee of nine houses in V. R., and possessed of leasehold houses in P. and K., and of 800 *l.* and 200 *l.* stock. She made her will in 1782, and (*int. alia*) devised the nine freehold houses to eight poor people of the parish, and the corner house to repair them. The personal property the testatrix disposed of as a fund attached to the freehold houses, but she did not dispose of the residue, though she said that *what was left* should be given to the poor in small sums. *Per Buller J.*

Sir R. P. Arden, M. R. doubted this case in *Attorney-General v. Boulton*, 2 Vef. jun. 380. but fully established it upon a review of all the cases in *Attorney-General v. Whitechurch*, 3 Vef. jun. 141.

—With

—With respect to the houses, the devise of them is void. Then if the gift of the 800 *l.* cannot be applied according to the disposition of the testatrix, a question arises, whether the court can apply it to some other matter *ejusdem generis*. The court has certainly thought it could vary the use, but the rule may be drawn from the cases, that wherever the court had directed the sum given to be applied to a different use, there had been a proper ground for the court to say, the use to which it had been applied was consistent with the use declared in the will; but there have been subsequent cases which have varied the rule (a). The second question was as to the residuum. The small sums given were out of a particular estate, and the words “*what is left*” only signified what was left of that subject; it is impossible to put any other construction upon it.

(a) In *Attorney-General v. Whitchurch*, Sir R. P. Arden, M. R. denied that the rule has been varied.

4 Mar. 1791, cor. Thurlow, C.
Leacroft v. Maynard,
3 Bro. Ch. Ca. 233.

25. The testator gave several legacies by his will, which he directed to be raised out of his real estate, and among others a legacy of 1000 *l.* to the hospital in the county of L., and specifically bequeathed his personal estate. The legacy was of course void, by the statute of mortmain. But the testator, by a codicil, revoked this legacy of 1000 *l.* to the hospital in the county of L., and, instead thereof, he gave the sum of 500 *l.* to the hospital in the county of N., without mentioning any particular fund out of which the same was to be paid. By the same codicil he revoked several other legacies, and, instead thereof, gave smaller legacies to the same legatees, without mentioning any fund out of which the same were to be paid. On behalf of the hospital of the county of N., Mr. Attorney-General contended, that the legacy being given generally by the codicil, must be payable out of the personal estate; and that it might be reasonably supposed, that, after making his will, the testator was apprised of the invalidity of the charitable bequests charged on his real estate, and therefore revoked them, and bequeathed other legacies, generally, out of his personal estate.

But Lord Chancellor said, he thought that the codicil only meant to alter the quantum of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid; and that, therefore, the legacy to the hospital in the county of N. was void.

26. Testatrix

§ 3. What Devises void in Mortmain.

C—a

65

26. Testatrix gave the residue of her personal estate (not having any real) to trustees, "to cause to be erected and built" a dwelling-house, to be appropriated for the use of a school-house, and directed and empowered her said trustees to purchase land for that purpose out of her real and personal estate. The trustees purchased land with their own money, which they were ready to give to the charity. Upon a bill, praying that the charity might be carried into effect, defendant demurred, for that the charitable legacies were void by the statute of mortmain. Lord Chancellor said, that in the case of *Attorney General v. Hide* (a), Lord Bathurst thought it must be the intention of the testatrix that the land should flow from her as well as other parts of the charity; but Lord Chancellor did not think that a necessary implication. On the terms of the will his lordship thought she did not know the statute, and that she intended part of the fund, if necessary, to be laid out in land. She meant principally, the charity to be executed, and surely it would not defeat her intention if the land came *aliunde*; but Lord Bathurst thought it equally her intent to give the land from a vain-glorious motive. But if it is to be so construed by the spirit of the law, it would be going but a little way not to save them by a distinction, that where the principal intent is to effectuate the charity, that intent will be satisfied by the land coming *aliunde*. His lordship could not conceive it would disappoint her intention if the whole land came *aliunde*. The question in this case is, Whether the authority given to the executors to lay out the money in land will bring it within the statute? If land were given, his lordship thought it clear the executors could not keep back one shilling of the bequest from the maintenance of the charity. Demurrer allowed.

P. 1792, cor. Thurlow, C.
Attorney-General v. Nash,
3 Bro. Ch. Ca. 588.

(a) Ambl. 752.

27. A bequest of money to be laid out in land for establishment of a minister of a chapel, is void, and not supported by supposing a discretion in the trustees not to lay it out in land; the directions being imperative.

M. 1792, cor. Lds. Commrs:
Grievors v. Case and others,
4 Bro. Ch. Ca. 67.
1 Ves. jun. 548.

Testatrix having, in 1776, endowed the chapel of *Fakenham*, directed, by her will, that 600*l.* should be laid out in the purchase of freehold lands, or copyhold with fine certain, and the rents to be applied to pay some small annuities; and "all the residue" she directed to be paid "in equal

Vol. II.

F

"moiety,

"moieties, one to *T. M.* for his natural life, the other to *S. E.* for his natural life; and after the decease of *T. M.*, one equal third part of the interest or rents to be paid to the preacher or teacher for the time being, who shall stately officiate in the chapel at *Brislow*, belonging to *T. M.*; the other two third parts to *S. E.* for his life; he and the said preacher exchanging upon Lord's-day alternately, the one at *Fakenham*, the other at *Brislow*, provided that *T. M.* and *S. E.* do not voluntarily withdraw from and refuse officiating when able at *Fakenham* chapel as usual; if they do, during such recess, the share of him or them refusing, to cease and go to the preachers appointed in his or their room; and after the decease of *T. M.* and *S. E.*, and the survivor of them, the interest or rents to be paid for ever to the preachers for the time being, who shall be chosen by the trustees of *Fakenham* and the trustees and major part of the communicants of the chapel at *Brislow*." There was a proviso, that in case of *S. E.*'s apostasy, he should have no claim under this devise.

The co-heiresses filed their bill; and Lord *Thurlow* had decreed that this devise was not void, so far as concerned the immediate annuitants.

On further directions, two questions were made:

1st, Whether, in order to support the charity, it was not possible to consider the trustees as not bound to lay out the fund in land?

2d, If not, whether the interest of the two annuitants (*T. M.* and *S. E.*) could be maintained, as being separated from the charitable trust, and intended as a personal bounty and favour to them?

Mr. Attorney-General cited *Grimmett v. Grimmett* (a) in favour of the charity, as considering the trustees not bound to lay out the fund in land.

It was contended for the two annuitants, that there are no such words in 43 *Eliz.* as maintenance for a minister, and it is not within the statute, though within the equity of it (b). The only ground whereon this case can be taken to be a charitable use within the statute is, that it is a provision for the benefit of those to whom the religion is to be administered, and not for the particular clergymen; for, giving a charity to provide a clergyman, cannot be deemed a charitable use with regard to the parson, any more than a gift to any other person can be charitable for the benefit of the person

(a) *Ambl.* 270.

(b) *Vide* 1 *Eq.* Abr. 95.

§ 3. *What Devise void in Mortmain.*

C—2

67

person to whom it is applied; as, to provide a surgeon for an hospital, &c. here it is a personal benefit, as in *Doe v. Aldridge* (c).

(c) 4 Term Rep. 264.

Mr. Solicitor-General denied the authority of that case, and said that, when this cause was heard before the Lord Chancellor, the whole of the will was not stated.

Lord Commissioner *Byre*—The question made by the Attorney-General must be first noticed, in respect of the possibility to lay out the fund otherwise than in land? As to the case of *Grimmett v. Grimmett*, his lordship said, whether he approved of that case or not, the present was substantially distinguishable, and upon the ground stated by Lord *Hardwicke* there; that, if it had been a disposition of money to be laid out in land, he should have been obliged to have said it was within the statute. Now this is that very case; and this devise is void within the statute of mortmain. The next consideration is, Whether these two persons are to be considered as having an interest detached from the trust, so as to be separated from the trust, though that should be condemned? It is said to have been the opinion of Lord *Thurlow*, that they were to be considered as entitled to a life estate, notwithstanding the trust was not maintainable. That opinion is the only circumstance which raised a doubt in his lordship's mind as to the true construction of the will. The case from the Term Reports (d) does not, upon consideration, bear upon this at all. But that opinion is a great authority, and deserves much consideration. Whether, according to the observation of the Solicitor-General, every part of the will fell under the eye of Lord *Thurlow*, it is impossible to say. But his lordship said, that opinion did not bind him, as the decree had not gone far enough to include that question; for though the language of it is, that that devise was not to be considered as void, so far as respects the immediate annuitants, his lordship could not comprehend these two persons under that description. The testatrix has determined who she meant by those words; for she comprehends expressly the persons to whom the small annuities are given as her annuitants; and there is nothing in the decree to authorise a supposition that the Lord Chancellor meant to comprehend more under those words than she did. Besides, in

(d) *Doe v. Aldridge*.

propriety of language, these two persons were not annuitants. The others, who had small sums given out of the whole, were strictly so; but not these two, who take the whole residue, or the rents and profits of the fund, if the fund is laid out in land. Therefore under the decree it is void, as against them in that character. Then can they be so separated from the general trust that this court is bound to condemn, as that their interest can be maintained, though the interests of those who come after them cannot? The object of the testatrix was to make a disposition to a charitable use; and though some arguments at the bar tended to shew the establishment of a minister not to be a provision for a charitable use, yet that argument upon the whole falls to the ground, because it is admitted that, in respect of the benefit which the flock are to derive from the exhortations of the pastor, it is a charitable use. Here the general object was to make an establishment for the two chapels at *Brisfow* and *Fakenham*. The latter was her own, which she had founded, and which was apparently her first object. *T. M.*, it appears from the will, was the stated preacher at *Brisfow*, and *S. E.* was one of the stated preachers at *Fakenham*. Having a general object to provide for both chapels, and having apparently a great confidence in *T. M.*, and a reliance that that chapel would be taken care of without a special provision in his life; and having a view that in all events *Fakenham* should be provided for, as it had been, by the alternate preaching of both; she begins with giving them an estate for life in these premises, with a condition annexed, that they do not voluntarily withdraw or refuse to do the duty they were accustomed to do at *Fakenham*. After the death of *T. M.*, when another preacher, whom she did not know, was to be appointed for *Brisfow*, she then comes to a more general idea of an establishment for both chapels. When *T. M.* drops, she arranges it in this way; that *S. E.* shall then take two thirds, and the preacher at *Brisfow* one third. But she expressly here makes that provision part of the trust and general object of the charitable disposition, because she has annexed to that, that they are to preach alternately at *Fakenham*. His lordship laid no stress upon that proviso, that if *S. E.* apostatizes, he is to have no part of her bounty,

bounty, but that shews the consideration of her bounty to these two persons, and that consideration affords the true construction.

It was argued with great force that there was a personal bounty intended to them. So there was, but it was equally apparent that it flowed from a confidence in them, in the character of ministers of these chapels, and not in any other way. Then it comes to the question, Whether, if a plain trust and disposition to a charitable use is manifested by the will, and intended throughout; but if that disposition is also manifested with a certain degree of personal bounty and favour to particular objects, that will take the case out of the statute? His lordship thought that if the personal bounty cannot be totally separated from the general object, in respect of which they are to have that preference, it is not sufficient; and it is proved clearly by the admission of the counsel for the two ministers, that if there is a general disposition to a charitable use, and the testator appoints the first preacher to exercise that function, that would be a case within the statute. That establishes the principle, that mere personal favour and confidence, and benefit too, manifested essentially by the preference made of one to another, as the first object of her bounty will not separate that favour from the trust. It was manifestly her intention to make a general provision for the two chapels. To suspend that as to one, till the death of *T. M.*; and to continue it as to the other, from the moment of her death, and during his whole life, and consequently there is a charitable use subsisting from the moment of her death as to *Fakenham* chapel; and these persons have this bounty only in respect of that charitable disposition, consequently their estate cannot be separated from the trust; and if that fails, this, which is a part of it, must fail also.

Then, as to *Doe v. Aldridge*, the comments which have been made save the trouble of saying much upon it. From that case may be collected circumstances enough to see what the testator in all probability did mean, yet it is an answer, that where he says he expects the devisee will promote the service of God, in those general words, the trust, which would be raised by the word "expect," would fail, because it is not sufficient to connect it with the other trust. If therefore there is a fair objection to connecting with the life

estate the subsequent trust, that estate is not a disposition to a charitable use. Therefore that case does not apply to this; for there is no benefit here intended to those persons distinct from this, that they had officiated at these chapels, and were intended to do so. Therefore the whole of this disposition, after the annuities, will fall under the general objection of a disposition of money to be laid out in land for a charitable use.

Lord Commissioner *Ashurst*, upon the first question, was clearly of opinion that the bequest was void in its nature. Those who have argued in favour of it have relied upon *Grimmett v. Grimmett*, in which Lord *Hardwicke* did not think the devise absolutely void: but that was entirely founded upon the wording of it. It was not a gift of money absolutely to be laid out in land; and though Lord *Hardwicke* did consider the case with a view to its being in the power of the trustees to lay it out so, if they thought proper; yet, as it was not obligatory upon them, he thought they would not in their discretion do an act which would be nugatory, but would suffer it to remain in the funds, by which means it would not be within the statute. Lord *H.* went in that case on a criticism upon the words, which cannot be done in this case; for the direction is imperative to lay it out in land.

As to the next question, his lordship did not think there was any thing to distinguish the case of the two ministers. It is true, the testatrix does appear to have had a particular predilection for them, from her long knowledge of them. But what was her general intent? It was to appoint a perpetual chaplain in these two chapels; and this appointment of these two was only the inchoation of that charity. It is also true, that during their lives she makes a particular qualification as to the application of the fund respecting those two, which is not meant to extend to future preachers. They are to take in moieties this benefaction; but her intention was as much to tie them down to the exercise of their function in these chapels, as those to come after. That is plain from the will, which makes it as much a charitable bequest with regard to them as to the others. As to the case in the Term Reports (c), it deserves due merit, though perhaps it was not looked into as much as it might have been. The foundation of that idea

(c) Doe v. Aldridge.

§ 3. What Devises void in Mortmain.

was, that it was nothing more than a bequest beneficial to the party, without annexing to it a stipulation of preaching in the chapel; which made it a charitable bequest as to the future preachers. Here it is expressly annexed to these two intents, which distinguishes this case from that. His lordship concurred with Lord Commissioner Eyre.

28. *I. C.*, a freeman of London, devised the residue of his real and personal estates to be laid out in land for the benefit of a charity. On behalf of the charity it was contended, that a freeman of London might devise in mortmain notwithstanding the statute, and cited 1 *Bac. Abr.* 681. as an authority (since the statute) that such was considered a personal privilege as to property out of the city. *Per* Lord Chancellor—The gift is void: the custom must be confined to lands within the city; it cannot extend to lands in *Yorkshire*.

T. 1793, cor. Loughb. C.
Middleton v. Carter,
4 Bro. Ch. Ca. 409.

29. Testator gave real and personal estates in trust, that a commodious and proper house should be taken on lease at such yearly rent as should be agreed on, or otherwise as the trustees should think fit, as a school, and that the children and grandchildren of some relations should be placed there from the age of seven to fourteen, and then to be put out apprentices: also that such other children as the trustees should think fit, should be placed at the same school; and he gave directions as to an inscription, visitation, &c. This trust is void under the *mortmain* act, as to the general purpose of a permanent charity, but good as to the disposition for the relations to the extent of children and grandchildren of such of the stocks specified as were in being at the testator's death; and while the school is kept open for them other children may be educated there.

8 July 1793, cor. Loughb. C.
Blandford v. Thackerell,
2 Ves. jun. 238.
4 Bro. Ch. Ca. 394.
See this case more fully stated
post, f. 6.

30. *A.* devised four freehold tenements in *S.* to the churchwardens and vestrymen of the parish, to be in the manner and custom of alms-houses for men and their wives, and he also bequeathed 2000*l.* stock as an endowment. This devise was held void in mortmain, and the personal bequest attached to it as an endowment must fall with its principal.

6 June 1796, cor. M. R.
Attorney General v. Whitchurch,
3 Ves. jun. 141. 146.
This case was decided on the
authority of *Attorney-General v.*
Goulding, 2 Bro. Ch. Ca. 428.
and is more fully stated post, f. 6.

31. Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint

14 Mar. 1797, cor. M. R. abf. C.
Attorney-General v. Ward,
3 Ves. jun. 327.

appoint by deed or will with three witnesses; in default thereof to the heirs of the husband. The wife surviving made a disposition by her will to a charity, and therefore void. Decreed to the heir of the husband.

21 Mar. 1798, cor. Loughb. C.
Middleton v. Clitherow,
3 Ves. jun. 734.

Note; In this case the Master reported that there were two other charities for the augmentation of small livings; one under the will of Mrs. Pyncombe, and the other under the will of Mrs. Home, to enable poor clergy to apply for the assistance of Queen Anne's Bounty. The trustees of both these societies were made defendants; but Lord Chancellor thought they could not possibly meet the description in the will.

32. A bequest was made "to the society for increasing clergymen's livings in England and Wales for the perpetual purpose of increasing their livings." *Per curiam*—The governors of Queen Anne's Bounty alone answer this description: and as all their funds are laid out in land, the bequest is void by the statute of mortmain.

SEC. 4. Of such Devises or Appointments to Charity as are good with respect to the Gift, yet void as to the Use, the same being either superstitious or such as the Policy of the Law will not admit; And herein of altering or diverting the same to other Uses, and of the Application of Charity Monies to Purposes *ejusdem generis*.

T. 1684, cor. North, C. S. 1.
Attorney-General v. Baxter,
1 Vern. 248. 251.
1 Eq. Abr. 56. pl. 9.

It appears that in T. 1689, this decree was reversed by the Lords Commissioners, and that the 600 l. which was brought into court was ordered to be distributed according to the donor's will.

Vide Attorney-General v. Hughes, 2 Vern. 105.

In *Mogridge v. Thackwell*, 1 Ves. jun. 469. Lord Thurlow said, that this case perhaps would not now be followed; for it is very hard indeed that the court should give the legacy to other charities because those which were mentioned could not take.

P. 1692, Canc.
Attorney-General v. Guise,
2 Vern. 266.

The determination of this case does not appear. It seems to be the note of a case only taken by Mr. Vernon, in which was cited *Gates v. Jones*, in Scacc., where

1. A. by will gave 600 l. to sixty ejected ministers. Upon an information by the Attorney-General it was held that the use of this charity was void, though not the charity itself, whereupon his majesty, in whose right the application of this money was contended to be, declared his pleasure that the 600 l. should be applied towards building *Chelsea Hospital*. But Lord Keeper, on hearing the cause, decreed the money to be employed in the maintenance of a chaplain for *Chelsea College*, in regard the charity being intended for ministers, ought to go amongst the clergy as in *eodem genere*. Should give the legacy to other charities because those which were

2. J. S. by will gave an exhibition for the maintenance of *Scotchmen* in *Oxon* to propagate the doctrine of the church of *England* there. It was insisted, that though the charity cannot take place according to the express direction of the will,
(*Presbyters*)

(Presbyters being established in Scotland by act of parliament,) yet the substance may be pursued, and it ought to be performed *cy pres*, and the devise shall not be void for the benefit of the heir or executor.

king, by reason that the donor's appointment was lost; and the case of Mr. Combes (deceased in 1679) was likewise cited, where testator devised a salary for maintenance of independent lectures in three market towns, and then devised the estate thus charged to his nephew, who afterwards devised it for payment of his debts. The arrears and growing payments were decreed to the charity, and the independent lectures were changed into catechistical lectures in the same three market towns, though there was not sufficient to pay the debts.

3. J. S. by will duly executed gave his estate to B., his heirs, executors, and administrators, and by a codicil written by himself, but not attested by three witnesses, declared the use to which he would have his estate applied in the words following: "I would have the same employed for the encouraging such nonconformist ministers as preach God's word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry, who are designed to labor in God's vineyard, among the dissenters; the particular method how to dispose of it I prescribe not, but leave it to their discretion, designing you (meaning B.) to take advice of C. and D." J. S., after making his will and codicil, bought a real estate; B., C., and D. died before the testator; and upon a bill filed against J. S.'s heir at law, and the administrator of J. S., to have an account of J. S.'s estate and to have the same disposed of in charity according to the will, it was objected, that the real estate was bought after the making of the will, and even if it had been bought before, B. dying before J. S. and the codicil not being duly executed in the presence of three witnesses, the lands must descend to the defendant, as heir at law, and cited Dr. Johnson's case, where the Doctor by his will charged his real estate with the payment of the charity; but the will not being duly witnessed, the devise was held void, to which the court agreed. N. B. There was land sold in Holland; but it not appearing what was the nature of the Dutch estate, whether freehold or leasehold, it was left to the master to inquire into that matter, and to certify what ceremonies a will to pass freehold lands in that country required. Objected also that as B. the legatee died before the testator, the legacy was lapsed; for Lutwych observed, that

a charity given to maintain popish priests was applied to other uses by the king, and not turned to the benefit of the heir. Sydenham's case, 1 Vern. 224. was also cited, where the application of a charity legacy was left to the

1732, cor. King, C.
Attorney-General v. Hickman,
2 Eq. Abr. 193. pl. 14. from a
MS Rep.

Another MS. Rep. of S. C. says—An information was exhibited by the Attorney-General for the performance of a charity given by a codicil annexed to the testator's will, by which he devised that what should remain and be the residue of his estate and effects be given for encouraging such nonconforming ministers as preach God's word in places where the people are not able to allow them sufficient and suitable maintenance, and for the encouraging such as are designed to labour in God's vineyard as dissenters; and appoints two persons to have the disposal and appointment of the said charity, both which persons died in the lifetime of the testator. Two questions arose: 1st, Whether both the trustees, to whom the disposal and appointment of the said charity was given, dying in the lifetime of the testator, this charity was not gone, and in the nature of a lapsed legacy? But per King, C.—The substance of the charity remains, notwithstanding the death of the trustees before the testator; and though at law it is a lapsed legacy, yet in equity it is subsisting; and here is a sufficient certainty of the testator's intention to revive it: the intention therefore of the party is sufficiently manifested that this charity should continue within the 43 Eliz. c. 4. It has been held, that if a tenant in tail devise a charity, though no

recovery is suffered, yet that it shall take place, and be effectual as an appointment under 43 Eliz. and cited 2 Vern. 453. Attorney-General v. Rye & al. 2 Vern. 755. Same v. Burdett & al. The 2d point, Whether this be a superstitious use within 1 E. 6. c. 14., non-conforming ministers and dissenters being such general words, as that they comprehend any persons however opposite to the church of England? But per Lord Chancellor—This cannot be a superstitious use within the statute; but the dissenters here meant are protestant dissenters acting under the Toleration-act, 1 W. & M. c. 18. 1 and decreed the residuum to be disposed of in present, and not in a perpetual charity; and ordered a scheme to be laid before him for that purpose.—2 Kel 34. pl. 24. S. C. in totidem verbis with this MS. Rep.

a legacy was a voluntary gift, which ought to be attended with all legal ceremonies; and therefore as to B., if the codicil had been out of the question, though it had been given to him, his executors, &c. yet by his dying before the testator the legacy had dropt; and as it now stands with the codicil, since by B.'s death the legal estate of the legacy is gone, how can a trust be raised without something to support it? To this it was answered, that in every common case of a legacy given on trust, though the trustee die before the testator, yet being only intended as an instrument to convey the legacy to him for whose benefit the legacy was given, this court always decrees the legacies to be paid. Besides it is observable that the advice of C. and D. was personal, and therefore the charity could not be specifically performed. But per Lord Chancellor—B. was only a trustee, and to whom C. and D. were recommended as fit persons to assist him in the execution of the trust; and though by the death of B., C., and D. the legal estate of the legacy is gone, and the charity cannot be disposed of by the very hands which the testator designed should have done it, yet the charity itself, which is the substance and reason of the devise, is still subsisting, and may be answered as fully by the aid and directions of this court, as if the legatee and his counsellors were alive. It was objected, 3dly, That admitting a bequest to presbyterians or anabaptists, or any other protestant dissenters, may be good, since the act of toleration, yet the present bequest being to all sorts of dissenters and nonconformists, may as well be extended to papists, Jews, &c. as to protestants, and therefore must be necessarily void. But per curiam—All persons know who are meant by dissenters, to whom any use may now be raised. Decreed an account of the personal estate to be taken, and the same to be distributed immediately, and not made a perpetual charity.

8 May 1754, cor Hardw. C. Da Costa v. De Paz, Amb. 228.

4. E. P. (a Jew) by will established a fund of 1200 l., the revenues of which were to be dedicated in founding a *Jesuba* or assembly for reading the Jewish law and instructing people in that holy religion. The question was, Whether this sum so bequeathed should belong to the heir at law, or if it was a charity for the crown to dispose of? Lord Hardwicke took this distinction, That where a devise is to a superstitious use and made void by statute*, or to a charity and made void by the statute of

* 1 Ed. 6. c. 14.

of mortmain *, there it should belong to the heir at law or next of kin; but where it is *in itself a charity*, but the mode in which it is to be disposed of is such that by the law of *England* it cannot take effect, as in the present case, where it promotes a religion contrary to the established church; there the crown by sign manual directed to the Attorney-General may give orders in what charitable manner it shall be disposed of (a).

Note: It seems that in the present case 1000*l.* of the testator's legacy was directed by sign manual to be disposed of to the *Foundling Hospital*.

5. The information stated that *R. B.* by will in 1691 gave the residuum of his personal estate to his executors, to be by them laid out in such charitable and pious uses as they should think fit; but recommended them to lay out the greater part thereof for the advancement of the Christian religion. The executors laid out 5400*l.* in land in *England*, and granted a perpetual rent-charge out of it of 90*l.* per ann. to the corporation for propagating the Gospel in *New England*, to be applied by that corporation as follows, viz. 45*l.* for the salary of two ministers to instruct the natives in or near his majesty's colonies in *New England* in the Christian religion, and 45*l.* per ann. to *Harvard College* in *New England*, to be by them applied to the salary of two other ministers to teach the natives in or near the said college the Christian religion, and subject to the said rent-charge of 90*l.* per ann. the executors conveyed the said lands to the city of *London*, upon trust to apply the surplus rents for the advancement of the Christian religion in *Virginia*, in such manner as the *Earl of Burlington* and *Bishop of London* (for the time being) should appoint, such appointment being to be made at *Lady-day* 1697, and confirmed by a decree of the court of Chancery. *Lord Burlington* and the *Bishop of London* made their appointment in *December* 1697, and laid down certain rules for the application of the charity in *Virginia*, the principal of which was, that the surplus rents and profits should be paid to the *English* agent of the *College of William and Mary*, to be by him remitted to the president of the college, who should expend so much thereof as would fit up and furnish rooms for such *Indian* children as should be brought to the college,

* 9 Geo. 2. c. 36.

(a) *Vide* Attorney-General v. Guise, 2 Vern. 266. Attorney-General v. Dr. Berriman's Executors, 11 Feb. 1752. Attorney-General v. Baxter, 1 Vern. 248. Rex v. Lady Portington, 1 Salk. 262.

M. 1790, cor. Thurlow, C. Attorney-General at the Relation of the Bishop of London v. The City of London. Case of the Hon. Robert Boyle's Charity, 3 Bro. Ch. Ca. 171. 1 Ves. jun. 243.

college, and also as would clothe, board, lodge, and educate them till they should be ready to receive orders, and then they were to be sent to preach and convert the *Indians*: the care and instruction of the *Indian* children was to be left to the president and masters of the college, subject to the visitation of the rector and governors; the state of the charity and its funds were to be annually transmitted to *Lord Burlington* and the *Bishop of London*, who were to give directions and establish future rules. In 1698 the charity was established and the foregoing rules ratified, with this variation only, that the yearly accounts should be laid before the court, and that all subsequent rules should be confirmed by the court. In 1772 an information was filed at the relation of the college of *William and Mary*, against the *city of London*, as trustees, and also against the *Bishop of London*, as having the sole right to form regulations, &c. for the charity (the title of *Earl of Burlington* being then extinct); the substance of which information was, that a certain portion of timber on the founder's estate might be cut down and sold, and that the then relators and the *Bishop of London* might lay a scheme before the master for the application of the produce thereof, together with the accumulations of the charity, which was decreed accordingly, and the money was directed to be paid into the Bank to the credit of the cause, but no directions were then given for the application thereof. The *Bishop of London* soon after died, and in 1787 the present relator was appointed in his stead, and became the only person entitled to regulate the charity, subject to the approbation of the court of Chancery; but no supplemental bill being filed, the relator claimed the benefit of the decree in 1773. It appeared also that the agent for the college of *William and Mary* after *Lady-day* 1782 had ceased to remit the surplus rents to the college, by reason (as it appeared) that in 1775 the provinces of *New England* and *Virginia* had fallen into a state of rebellion against the King of *Great Britain*, and so continued until 1783, when they were declared to be independent states, and therefore it was insisted that they were to all intents and purposes aliens as to *Great Britain*, for which reason no further payments ought to be made in *America* on account of the said charity. The present bill therefore prayed to have the benefit of the decree in 1773, and for further directions,

directions, and that the charity monies might be laid out for the advantage of the Christian religion in *England*, and that the agents might be restrained from remitting any more money to *America* for the former purposes. The *College of William and Mary*, by their answer, insisted on a charter granted to them by *King William and Queen Mary*, and on their title to the rents and profits of the estate. *Harvard College* did not appear. Lord Chancellor could not see how the *Bishop of London's* bill was to be maintained, for that as a trustee for the mode of administering the charity, he had not sufficient interest to sustain a bill. The trusts for converting neighbouring infidels had ceased for want of objects (there being no such now). The charity therefore must be applied *de novo*. Lord Chancellor could not now consider the *American* colleges as corporations. The Master was therefore directed to propose a plan for applying the produce of the estates according to the intentions of the founder. An information was proper, but the present bill improper; that therefore was dismissed as to the *Bishop of London*, he not having sufficient interest in the funds to become relator. Costs were given to the agents, receivers, and trustees who had accounted fairly and paid money into court, but costs cannot be given to a college individually, nor as a corporation, unless proved so to be.

SEC. 5. In whom the Nomination of Objects shall rest, where the Description of the Devisees or Appointees of a Charity is ambiguous, uncertain, or defective.

1. TESTATOR (*int. al.*) charged a manor with 1000*l.* to be raised out of the profits, and to be applied to such charitable uses as he had by writing under his hand formerly directed; but no such writing was to be found. Defendant as brother and heir at law of the testator being in possession of the estate, a bill was filed by the governors of *Christ's Hospital*, alleging the expressions of testator's partiality towards them, and that as no such writing could be found, his majesty had declared that testator's legacy should be laid out for the benefit of their

H. 1683, cor. North, C. S.
Attorney-General v. Syderfin,
1 Vern. 324, 225. 1 Eq. Abr.
96. pl. 8.

Lord K. cited the case of *Fryer v. Peacock*, where testator devised his surplus for the good of poor people for ever, and held that the devise being indefinite, the king might appoint.

their mathematical scholars, and it was therefore prayed that the same might be so applied. *Per Lord Keeper*—As the writing is not to be found there is no doubt but (the charity being general and indefinite) the application of this money belonged to the king; and his majesty having declared in favor of the *mathematical boys of Christ Hospital*, his lordship referred it to the Master to see it laid out in land for their benefit, and decreed accordingly.

Note; The defendant in this case was indemnified by the decree against the writing referred to, in case the same should be found.

M. 1702, Cant.
Anon. 2 Freem. Rep. 261, 262.
2 *Eq. Abr. 190. pl. 1.*

2. It was said in this case. and not denied, that if a man devises a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no directions either by note or codicil, a court of equity hath power to dispose of it to such charitable uses as they shall think fit. And so it was held in the case of *Siderfin's* will, and the case of one *Jones*; but if the will points at any particular charity, as for maintenance of a schoolmaster, or poor widows, then the court ought not to direct it to any other purpose but such as is pointed at by the will (a); as if the devise should be for such school as he shall appoint, and he appoints none, the court may apply it for what school they please, but for no other purpose than a school.

(a) Rule; charity must pursue the intention of the founder.

P. 1700, cor. Cowper, C.
Anon. 2 Eq. Abr. 190. pl. 3.

3. J. S., by will, gave his executors 2000 l. to be disposed of by them to his poor relations (for whom he had not provided by his will) according to their discretion and conscience, within six months after his death. It was prayed that the statute of distributions might be the rule and measure of disposing of this charity. Lord Chancellor said, he would not restrain it to the next relations, but poor relations (which are second cousins) must be included, not that he would confine it to this degree; for there may a deplorable case happen that may be an inducement to a court of equity to go beyond the second degree, there may be other relations entitled to this charity, as well as those before the court, therefore let the parties come before the Master, and other relations within the description of the will, and put in their claims.

He

He said he did not mean by this decree to take the discretionary power from the executors, which was given them by the testator; and therefore ordered the executors to appoint the persons and proportions of their dividends, according to their discretion and conscience; and if they refuse any relations as not within the description, the Master to take the reasons of such refusal; for although this court will not deprive the executors of their power, yet it will superintend them, and see that there is no abuse of the charity. The relations parties to the suit to be examined upon oath, whether they do know any other relations that are fit objects of this charity. A dispute arising concerning costs, Lord C. said, what charges the parties have already been at must be paid out of the estate at large, but the future costs out of the 2000*l*.

4. *A.*, by will, gave a legacy of 5*l*. to the poor of two hospitals in *C.* naming them, and by codicil gave 5*l*. per ann. to all and every the hospitals. Testatrix lived and died at *C.* This legacy was held not to be void for uncertainty, but to be intended for all the hospitals in *C.* (a), and not to extend to an hospital a mile out of the town, though of the same foundation and governed by the same statutes.

P. 1718, cor. M. R.
Myster v. Masters, 1 P. Wms. 435.
2 Eq. Abr. 192. pl. 7.
322. pl. 13. 352. pl. 12.
366. pl. 7. 554. pl. 10.

(a) *Vide* Attorney-General v. Hudson, 1 P. Wms. 674.

5. The testator made his will, and (*inter al.*) devised in these words: "All the rest of my personal estate I give to my executors, in trust to employ to such charitable uses, as by codicil I shall appoint." Afterwards, by codicil, taking notice of the will, he directed "the residue to be applied to such uses as he by codicil should appoint," and died without making any appointment. The king shall not have the disposal of the trust, as of a general charity.

H. 1730, cor. King, C.
Wheeler v. Sbar & al. Mos. 290.

6. One seised in fee of a manor, granted a rent-charge out of it for a charity towards the support of several poor old men, and afterwards the founder of the charity granted the same manor to *J. S.* and his heirs, and died. The question in this case was, Whether the heir of the grantor of the charity, or the grantee of the land, should nominate these poor men? *Per cur.*—The heir of the grantor should have the nomination, the same being incident to the founder (a) and his heirs, or to those whom he should appoint. When the lands were granted away, the rent-charge, a thing independent

M. 1732, cor. King, C.
Attorney-General v. Rigby,
3 P. Wms. 145.
2 Eq. Abr. 201. pl. 2.

(a) *Vide* Eden v. Foster, 1 P. Wms. 326. Attorney-General v. Price, 3 Atk. 198.

(b) A man founds a charity for alms-houses; the founder and his heirs have a right to nominate the objects, but may forfeit it by a corrupt or improper nomination, or by making no nomination at all; but this neglect of nomination must be after such time as the founder, &c. has had notice of the vacancy; and without proof of such notice, it is no fault. *Per Lord Parker in Attorney-General v. Leigh, T. 1721, 3 P. Wms. 146. (n.)*

Vide Attorney-General v. Boulton, 2 Ves. 380. where Sir R. P. Arden, M. R. has commented on both these cases.

30 Nov. 1735, cor. M. R.
Doyley & al. v. Attorney-General & al et contra, 2 Eq. Abr. 194. pl. 15. 4 Vin. Abr. 485. pl. 16.

(a) *Qu. if it should not be equality?*

independent and collateral, did not pass therewith, like a rent-service, which is incident to the reversion; whereas, this being a rent-charge and in fee, had no reversion (b). But forasmuch as the grantees and owners of the land had for upwards of 60 years enjoyed the nomination of the objects to the charity, the court would not disturb any thing that had been done, but allowed them all the payments they had made to the poor of their own nomination.

7. J. S., by will, dated 22d March 1714, gave all his real and personal estate to trustees, their heirs, &c. in trust to pay the produce thereof to his niece A. for life; remainder to the son and sons of A.; remainder to the daughter and daughters of A.; remainder to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, and for such charitable uses and purposes as they should also think most proper and convenient. One of the trustees declining to act, A. the niece brought her bill in Mich. 1715 to compel him to act, or to transfer the trust, as the court should direct; and he refusing to act, the court decreed him to assign the trust as the Master should direct, and accordingly he by lease and release assigned and conveyed the premises, with the Master's approbation, to another person in trust for the uses of the said will. A. the niece died without issue in 1732; and on a bill brought by the testator's relations on the mother's side to have their share of the said estates, and on a cross bill brought by the Attorney-General to have the same applied to such charitable uses as the court should direct, the Master of the Rolls held clearly, that the limitation over of the personal estate was good, and that the power given by the will to the trustees of distributing the testator's estate as they thought fit, was at an end, and could not be assigned over; and that therefore the power of distributing the same devolved on the court; and he directed that one half of the said estates should go to testator's relations on the mother's side, and the other half to charitable uses; the known rule that equity (a) is equity, being (as he said) the best measure to go by. He said he had no rule of judging of the merits of the testator's relations,

relations, and could not enter into spirits, and therefore could not prefer one to the other; but that all should come in without distinction (b), excluding only those that were beyond the third (c) degree. He held, that as to the personal estate there could be no representation of those relations who died in the niece's lifetime; for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not; and decreed accordingly.

(b) His Honor cited a case determined by Lord Cowper, where one gave his personal estate to his relations fearing God and walking humbly before him: and decreed that it should go equally among his relations.

(c) *Sed vide* an Anon. Ca. 2 Eq. Abr. 190. pl. 3.

8. L. by will gives to *Bread-street Ward* 200 l. according to Mr. —'s will. Lord *Hardwicke* would not allow of parol evidence to explain the testator's intention when there is a blank only; but decreed the money in this case to be disposed of in such charities as the alderman for the time being and the principal inhabitants shall think most beneficial to the ward.

29 Jan. 1741, cor. Hardw. C. *Baylis & an. v. Attorney-General*, 2 Atk. 240.

Note; Where a person is mentioned by a nick-name, or where two persons have the same christian and surname, parol evidence has been admitted to ascertain whom the testator meant, but never where the name is left entirely in blank.

9. A doubt arising in this case, Whether the donor of a charity intended the capital sum to be disposed of or only the interest and produce, Lord *Hardwicke* said, he did not know an instance where the court of Chancery in any case of charity had taken upon itself such an arbitrary disposition as to confine it to a gift of the interest and produce only, when there is no more certainty of the donor's giving the capital than the interest, but it is left quite obscure and in the dark. His lordship directed the Master to inquire who came under the description of the donor as proper objects of charity.

23 June 1741, cor. Hardw. C. *Attorney-General v. Bucknall*, 2 Atk. 328.

10. *George Cranfown* by will gave the interest of 4200 l. bank annuities to the poor inhabitants of *Saint Leonard, Shoreditch*. Upon a bill to establish the charity, it was insisted by defendants that the bequest was void for uncertainty in the description of the persons to take. Sir *Thomas Clarke*, M. R. said, the court forms a judgment upon taking all the circumstances into consideration, and inclines in favor of the disposition *ut res magis valeat*. In *Attorney-General v. Rance*, 18 July 1723, a legacy was given to the poor. There were no words in the will which discovered what poor he meant; but it appearing that the testator was a *French refugee*, the court

17 Nov. 1762, cor. M. R. *Attorney-General v. Clarke*, Amb. 412.

directed the legacy to be given to poor refugees. In *Attorney-General v. Brown*, 18 November 1749, the words were very general, but his Honor did not mention them.

The words in the present case are not so uncertain as in those cited. The word *inhabitant* bears a very general sense, and may extend to every body living in the parish; but, as it could not be intended that the poor inhabitants which are relieved by the parish should have benefit by this legacy, which in effect would be giving to the rich, and not to the poor, his Honor declared that the distribution of the legacies was to be confined to the poor inhabitants of the parish of *Saint Leonard, Shoreditch*, not receiving alms, and ordered a scheme to be laid before the Master for such distribution.

27 Nov 1761, cor.] M. R. abf. C.
Waller v. Childs, Am. 524.

11. *E. K.* by a codicil gave the residue of his personal estate in trust, for the augmentation of the charitable collections for *poor dissenting ministers* of the Gospel in any counties in *England*, to be paid to the treasurers of such charitable societies, or fund, as the major part of his trustees should appoint. The executors, by their answer, stated, that the *protestant dissenters* in this kingdom are distinguished by the several denominations of *Presbyterians, Independents, and Baptists*; and that the dissenters of each of those denominations, living and residing in and near town and *Westminster*, have a separate society, consisting of persons chosen out of their respective congregations, which society is called by the name of "*The Managers of the Fund for the Support of the Poor Dissenting Ministers of that Denomination in the Country*;" and that there are charitable collections annually made at the meeting-houses belonging to most of the several congregations of each denomination in and about the cities of *London* and *Westminster*; and the money given at such collections is constantly and regularly carried to the said fund, and paid into the hands of the treasurer thereof for the time being; and that the same is disposed of by the said managers of such funds, for and towards the support of poor dissenting ministers in the country, whose annual subscriptions from their own congregations are so small as not to be sufficient, in many cases, to support themselves and families with the common necessities of life; and also, for the relief of any extraordinary necessitous cases

cases

cases of such poor ministers and their families as may occasionally occur; and they have each a treasurer, who takes minutes of their proceedings at their several meetings, which are fairly entered in books kept for that purpose, as also the accounts of the disposition of the said charity.

On hearing the case upon the Master's report a question was made, Whether the charity bequests were not void for uncertainty in the description? But the court was clearly of opinion, without hearing the counsel for the charity, that the bequests were good upon the words of the will, and upon the evidence which was read in support of the answer, and that they were intended for all the ministry in general; and ordered the money to be paid to all the treasurers of the three denominations, upon the trusts of the codicil.

A question was made by the court, Whether they could marshal assets in favor of the residuary bequests, by directing the leaseholds to be applied in the first place in payment of debts and legacies, in order to leave the rest of the personal for the benefit of the charity. But it was given up on the part of the charity, upon the authority of the *Attorney-General v. Tyndal* (a). *Attorney-General v. Caldwell* (b).

(a) Ambl. 614;
(b) Ambl. 635.

12. This case was on a devise generally of lands in trust to be sold or mortgaged to pay debts, &c. and the overplus money and rents of the messuages remaining unsold, to be applied to *charitable and pious uses* generally. Upon an information to have the trusts of the will carried into execution, Lord Chancellor said, "He was inclined in favor of the heir; but the authorities were too many and too strong to contend with (a)." But that he would apply to his majesty for his sign manual as Lord Nottingham did in *Attorney-General v. Peacock*, 27 Car. 2. (b).

T. 1772, cot. Apsley, C.
Attorney-General v. Herrick and others, Ambl. 712.

(a) Lord Chancellor here read from Lord Hardwicke's Note-book the cases of *Cooke v. Duckenfield* (reported in 2 Atk 262.) and *Da Costa v. Depas* (reported in Ambl. 228.), as also a case in 1743, where it was determined, "that there being no particular charity, his majesty might dispose of a legacy of 400 l. as he should think fit."

(b) Lord Chancellor also read a note of *Attorney-General v. Peacock*, from Lord Nottingham's book.

Lord Nottingham had determined, that "although it was uncertain to what poor the charity in question should be applied, his majesty might dispose of it," and his lordship, on a second hearing, in 28 Car. 2. said, "no objection to the uncertainty of the object for the king may appoint."

13. Archbishop Secker (*int. al.*) gave 1000 l. 3 per cent. Bank annuities to his trustees, for establishing a bishop in his majesty's dominions in America, and also 1000 l. to be laid out in *repairing parsonage-houses*; and testator ordered, that if any charity to which he had given a legacy should

H. 1785, cor. Thurlow, C.
Attorney-General v. Bishop of Chester, 1 Bro. Cb. Cas. 444.

(a) *Vide* 4 Bro. Ch. Ca. 444.
(n.), Attorney-General v. Bishop
of Oxon. Brodie v. Duke of
Chandos. Attorney-General v.
Hutchinson. Attorney-General
v. Tyndall. Pelham v. Ander-
son.

M. 1790, cor. Thurlow, C.
Attorney-General v. Oglander,
3 Bro. Ch. Ca. 166.

M. 1790, cor. Thurlow, C.
Attorney-General v. the City of
London, 3 Bro. Ch. Ca. 171.
1 Ves. jun. 243.
See this case fully stated, ante,
f. 4. pl. 5.

no longer subsist, such legacy should fall into the residue. It was admitted that a gift of money to build on land already in mortmain was good in law (a); but by the defendant it was insisted, that as to the other legacy it must fall into the residue as a void legacy, there being no likelihood of any bishop in America. *Sed per* Lord Chancellor—The money must remain in court till it be seen whether any such appointment shall take place; and with respect to the selection of objects for the other legacy, proposals must be laid before the Master of objects proper. Referred accordingly.

14. Where a charity is so given, that there can be no objects, the court will order a different scheme; but not where objects may (though they do not at present) exist.

15. A trust for the advancement of Christianity among infidels in America wanting objects (from there being no infidels within the limits intended) must be appointed *de novo*. In the present case it was referred to the Master to lay a new scheme before the court.

SEC. 6. In what Cases Equity will control a Devise to a Charitable Use or any Eleemosynary Appointment; how far the Words of such a Devise or Appointment shall be construed to extend; and where the strict Letter of the original Gift is capable of Mitigation or Variation: And herein of the Doctrine of *Cy pres*.

P. 1682, cor. Finch, C.
Man v. Ballett, 1 Vern. 42.
1 Eq. Abr. 99. pl. 4.

P. 1682, cor. Finch, C.
Attorney-General v. the Margaret
and Regius Professors in Cam-
bridge, 1 Vern. 55. 1 Eq.
Abr. 99. pl. 5.

1. NO agreement of parishioners to whom a charity is given can alter or divert it to other uses than those expressly limited by the donor.

2. The court in this case refused to mitigate or alter the terms on which a lectureship was founded in Cambridge for reading in polemical or casuistical divinity, though no opposition was made to the application. The consent of the heir cannot alter the disposition made by his ancestor.

3. One

§ 6. *How far controlled in Equity—Doctrine of Cy pres. C—* a 85

3. One Penning, of Saffron Walden, and several others, subscribed to a charity-school there, of twelve boys and girls, which subscription was only during the pleasure of the benefactors. P. delighted with seeing these charity-children, declared he would leave them something at his death. There was also a free-school in the same town; and P. made his will, giving "500 l. to the charity-school," and several pecuniary legacies to his poor relations, and died. The executors insisted on the want of assets. Lord Chancellor said, that though the free-school be a charity-school, yet the charity-school for boys and girls went more commonly by that name; and as the testator was fond of the latter, and declared he would leave them a legacy, therefore that, and not the free-school, was entitled thereto; and ordered the legacy to be brought into court with interest from the end of the year after the testator's death: and in case of a deficiency of assets, that all the pecuniary legacies, as well that to the charity as others, should abate in proportion; for though the *Romans* preferred a pious or charitable legacy to others, yet our law does not; they being all but legacies, and equally intended by the testator to be paid, it would be hard that one of them, by being preferred, should frustrate all the rest; besides all the other legacies being to several of the testator's *poor relations, they are charities also* *. And because it was objected, that on the failing of the charity-school, the charity ought to revert to the founder, therefore in such case his lordship gave liberty to the parties to apply again to the court.

4. Sir John Walter founded a lectureship at Churchill, with a salary of 50 l. per ann. charged upon his lands to the lecturer, so long as he should attend the charge of diligent preaching there once every Sunday, unless hindered by necessity; and when the lectureship should be void by death, removal, or other departure, then the trustees were to appoint a new lecturer. The plaintiff in 1701 was appointed lecturer by the trustees expressly for the term of his natural life; but being much in debt, about a year and an half afterwards he went away, and was chaplain to a regiment in Spain, and continued many years abroad. In 1710 the trustees appointed J. G. lecturer, and in the deed of appointment they re-

G 3

cited

M. 1720, cor. Parker, C.
Attorney-General v. Hudson,
1 P. Wms. 674.
2 Eq. Abr. 192. pl. 9.

* *Full Case of Caroon-House*
at Lambeth, Finch, 353. *Fielding v. Bond*, 1 Vern. 270. *Attorney-General v. Robins*, 2 P. Wms. 25. *Masters v. Masters*, 1 P. Wms. 423. *Tate v. Austin*, 1 P. Wms. 265.

P. 1720, cor. Parker, C.
Philips v. Sir John Walters and others, 2 Eq. Abr. 198. pl. 4.
4 Vin. Abr. 494. pl. 14.

Assumed in Parliament, 2 Bro. P. C. 198.

cited that the *lectureship* was vacant by plaintiff's departure, and that thereupon they appointed J. G. lecturer. Plaintiff's bill was to have an account of the profits and salary of lecturer, &c. First point was, If the trustees could remove the plaintiff from the *lectureship* for going abroad, and not personally preaching there every Sunday, and appoint a new lecturer in his room? Secondly, admitting they had a power to remove him for absence, if defendants the trustees ought not to account to the plaintiff for the profits of lecturer to the time that the new lecturer was appointed? Parker C. was of opinion, that defendants employing another person to preach in plaintiff's absence, acted therein as his agents and not as trustees of the charity, and ought to account for the profits of the *lectureship*, deducting what was paid by him for supplying the plaintiff's place in his absence: whether the appointment of the new lecturer was good or not, yet defendants having paid the whole salary to J. G., will discharge them against the plaintiff as his agents in procuring a proper person to preach, and to do the duty for the plaintiff. Upon taking time to consider if the appointment of the new lecturer was good, (which Lord Chancellor at first doubted,) his lordship held it was, and said, the *lectureship* was not void by the 13 & 14 Car. 2. c. 4. for not reading the Common Prayer (a); for that act inflicts a penalty, but does not make the *lectureship* void; but the *lectureship* was void by plaintiff's absence; and the necessity of absenting himself by reason of his debts was not the necessity intended by the founder to be an excuse for his absence; and though he was declared lecturer expressly for life, yet he is subject to the terms imposed by the founder; for the trustees cannot alter the terms and nature of the trust; and the first appointment is superseded by the second without any other act.

(a) It was proved, that the plaintiff did not read the Common Prayer the first time he preached, according to the said act of uniformity, l. 19.

M. 1724, Canc.
Wright v. Hobert, 9 Mod. 64.
 Duke's Ch. Uses, 164. Baylis
 v. Attorney-General, 2 Atk. 239.
 Attorney-General v. Middleton,
 2 Ves. 237. 6 Com. Dig. tit.
 Uses (N 21). Aylet v. Dod;
 2 Atk. 238. *Burford v. Lenthall*, 2 Atk. 550. *Jones v. Cozeter*, 2 Atk. 400.

11 Mar. 1737, cor. Hardw. C.
 Attorney-General on Relation of
 University College, Oxford, v.
 Dr. Sepbent and another,
 3 Eq. Abr. 196. pl. 17.

5. A grant of land to charitable uses, viz. "that as many of the inhabitants of the parish of A. as were able to buy three cows might feed them on the land from May to August," extends to every inhabitant who has three cows.

6. Doctor Radcliffe by his will devised to trustees an estate in Yorkshire upon trust to receive the rents and profits, and to pay to two persons upon the phisic line, that

§ 6. How far controlled in Equity—Doctrine of Cypres. C—a 87

that were members of University College, Oxford, the several annual sums of 300*l.* each, for their maintenance for the space of ten years, five of which years at least it was the testator's will that his fellows should travel abroad for their better improvement: and this charity was to continue for ever, and the Archbishop of Canterbury for the time being, and several others, were to be trustees, and to manage it, and to chuse such fellows upon a vacancy. The doctor by his will also gave a sum of money for building his fellows chambers in University College, and devised the rest of his estate to the same college. About the year 1725 Doctor Stephens was elected to be a travelling fellow; and after he had continued a fellow five years, and had received the stipend without ever going abroad, upon pretence of bad health, in 1730 he resigned his fellowship to the Archbishop of Canterbury and another trustee, who accepted his resignation. In 1735 an information was filed against him, suggesting a fraud upon the will of the testator, and praying that he might repay to the college the sum of 1500*l.* which he had unjustly received, having never designed to travel; and also suggesting that the testator intended his fellows should live in their chambers, and keep them in repair, whereas Doctor Kidby (another of the testator's fellows, and also a defendant) lived altogether out of the college, and suffered the chambers to go out of order. The information therefore also prayed that Doctor Kidby might be enjoined from letting his chambers, and that he might be obliged to put them in repair. There was proof that Doctor Stephens was in a languishing way, and had often spoke of going abroad according to the testator's will; that he had studied very hard in England, and made a great proficiency in the study of physick; and there was no evidence for the relators to the contrary. Lord Chancellor Hardwicke said, he would by no means do any thing to invalidate so noble an institution as this; it is undoubtedly admirably contrived to the end it was designed for, and deserves all the encouragement a court of justice can give it; but in this, as well as other cases, his lordship said he must govern his judgment by the established rule of law and equity. There are three things proper to be considered in this case; 1st, What Doctor Radcliffe's intention was; 2dly, If Doctor Stephens had complied with it, and if he had not, whether the relators are entitled to recover back the money paid to him. It must be ad-

1 Atk. 358.

Case on Dr. Radcliffe's Will.

Grounds & Rud. Law, 30.
pl. 5. S. C. is stated thus: Dr. R. by will devised 300*l.* per ann. to two persons, to be chosen by the Archbishop of Canterbury and certain other trustees out of University College, Oxon. which sum he directed to be paid them for 10 years for their maintenance, five years whereof they were to spend in England in the study of physick, and the other five abroad. The defendant was one so chosen, and studied here according to the directions of the will, and for that time received his salary; but after, he did not go abroad on account of his ill state of health; and thereupon, in 1730, he resigned to the trustees, who accepted his resignation, and in 1735 chose another in his room. The information was exhibited against the defendant, that he might account for five years' salary by him thus received. Mr. Fazakerly, for the defendant, argued, that in a late case, which came before the House of Lords on an appeal, their lordships were of opinion that the word maintenance included education; and therefore, though that word was used in the present will, education must be intended by it as implied: he also argued, that when the defendant had spent half his time in his education here in England, and was prevented by ill health from going abroad, and therefore had resigned, and his resignation accepted, and another chosen in his room, he submitted it, that the present bill must be thought an unreasonable one. Lord Chancellor was of the same opinion; and said, the name of the case cited was *Gandy v. Ayscote*, 4 Bro. P. C. 186; so dismissed the information. Gro. & Rud. cites 2 Ju. Eccl. 157, 8.

mitted, if Doctor *Stephens* has forfeited his annuity, the relators (who are entitled to the residue of the testator's estate) are entitled to it. That by the will of Doctor *Radcliffe* his fellows were to travel five years, is very plain; but the time when is not fixed; and, as their travels were to be for their better improvement, i. e. *after they had laid a foundation of learning at home*, it is most natural to suppose that he designed they should travel in the latter part of their time; and, though they were to travel some part of their time, yet his lordship could not think they were to travel at all events, upon the penalty of forfeiting whatever they had received from the charity; to make this necessary, it must be supposed that their travelling was the only thing that Doctor *R.* had in view, which is impossible, for it was to be for their better improvement. Besides this benefaction is for their *maintenance*, and if, as it may happen, a fellow should be disabled from travelling, and he should without any fault in him be obliged to refund what he had consumed in his maintenance, that would be exceeding hard. It cannot be said that Doctor *Stephens* has complied with Doctor *Radcliffe's* intention, for he has not been abroad; but then it comes to this question, Whether he has given a reasonable excuse? the loss of sight, understanding, and such like visitations, would be undoubtedly good excuses; but it is urged, that Doctor *Stephens's* intention was originally fraudulent; that he designed from the first to put five years salary in his pocket, and then to throw up his fellowship without going abroad; and if such a case had appeared, as it might have been made out by circumstances, his lordship could have made no scruple of decreeing him to account; on the contrary, Doctor *Stephens's* design of going abroad is proved by him, and that it was frustrated by a bad state of health and a decay of nature; how fit he was to go abroad does not appear; but as the relators have not examined at all to this point, nor endeavoured to shew him in a capacity to take a voyage, his lordship said he must rely on the evidence that is given for him; besides, in the will, the words are not conditional; but only *directory*; and if at law *A.* should promise to pay *B.* 300 l. a-year for ten years, and *B.* should engage to go abroad for five years of the ten, though *B.* should not travel, yet *A.* without payment of the whole salary, could not upon such executory contract,

contract recover against B. for not going abroad. In this case it is very material, and a very strong argument, that the trustees of the charity, as now standing in the place of Doctor R., have accepted the defendant's resignation, which must be supposed to be done upon some reasonable foundation. His lordship considered their act as the judgment and act of Doctor R. himself. Suppose a patron upon presenting to a church should take a bond from the parson to reside there for twenty-three years, if he should so long live, and he should afterwards assent to the parson's resignation, would not this act of his dispense with the consideration? In the same manner the trustees have dispensed with the obligation that Doctor Stephens lay under to go abroad, so that as to him the information must be dismissed, but *without costs* (a). As to Doctor Kidby, as a fellow, he is proprietor of his chambers, and may use them as other fellows do; he is a member of the college, and the court has no business to give any directions how he shall employ his chambers there; so the information as to Doctor Kidby was likewise dismissed.

(a) The bill was dismissed without costs in regard that Dr. S. had received largely of the bounty of Dr. R. during his continuance in the college.

7. *M. W.* having by will left several sums of money to be distributed in charity at the discretion of his executors, he named three persons as executors, one of whom died before the information filed. This is not a bare authority, but coupled with an interest; and the nomination of the objects to partake of the charity survived to the other two executors (a). But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case of misbehaviour the court may interpose; for it must be allowed that the court has a particular, free, and extensive jurisdiction in the case of a charity, and is not confined to the ordinary methods of proceeding as in other cases. The executors could not divide the charity into three parts, and each nominate absolutely; for the determination of the property of every object was left by the testator to the direction of *all* the executors. So much of the information, therefore, as sought a specific performance of a pretended agreement to that purpose, was dismissed with costs, to be paid by the relators (b).

M. 1718, cor. Hardw. C. Attorney-General v. Gleg, 1 Atk. 356. Amb. 584.

(a) With respect to *naked powers*, and powers coupled with an interest, see *Esurg. Co. Litt. 123. (a), note 2.*

(b) This was said to be the first instance of such a direction; but *Ambler* does not notice it.

8. The corporation of *N.* in 1684 leased to trustees for 1000 years to make improvements, in trust

6 Aug. 1740, cor. Hardw. C. *Attorney-General v. Lord Gower, 9 Mod. 224. Barnard, 145. 152.*

trust to permit the corporation, &c. to dispose of the rents and profits to the maintenance of a minister and relief of the poor inhabitants, and to no other uses whatsoever. The corporation continued in possession, and made orders until 1735, and the lessees did not intermeddle therewith: in 1735 the executor of the surviving trustee assigned the lease. Lord Chancellor refused to establish the term assigned by the surviving trustee, but established the charity which had continued and been complied with from the making of the lease; for such long usage, he said, was an evidence that there was the like claim before the lease was made, as there was no evidence to the contrary.

3. Mar. 1749, cor. Hardw. C.
Attorney-General v. Day,
 1 Ves. 218.
Case of Mr. Eldridge's Will.

9. J. E. made a conveyance of a real estate for the benefit of a charity; ten days after he made his will, by which he gave 3000*l.*, the exact value of that land, to the same charity, and 250*l.* to the same, and devised the estate to A. and B. as tenants in common. After his death, a bill was brought for a general account, and for the direction of the court for the settlement of J. E.'s estate under his will. The court directed the Master to receive a scheme, part of which was to consider in what way the money should be laid out, and a perpetual fund created for the charity. The Master reported a scheme for laying out 3000*l.* in the purchase of the devised lands, and the 250*l.* in other lands for building a charity-school.—The cause was set down for the charity to be heard on the matter reserved, and the court made a decretal order, confirming the Master's report (a), that the scheme should be approved of, and the other matters therein carried into execution, none of all which was opposed, but acquiesced in by A. one of the tenants in common, after whose death a bill was filed on behalf of the charity, to have the purchase carried into execution. B. the other tenant in common was dead, having settled the estate on himself in tail. A question then arose, Whether the parties were entitled to carry this purchase into execution by the aid of a court of equity? Lord Chancellor—The general rule certainly is, that this is decretionary in the court, but that will not hold in this case, for that holds in cases where there may be an election of two remedies, either in equity for a specific performance, or by action at law. Here there can be no remedy at law, all arising under

(a) Lord Chancellor, in pronouncing judgment, said, This order would not have been made if it had been fully considered.

§ 6. *How far controlled in Equity—Doctrine of Cy pres.* C—a 91

under the acts of the court from the former decretal order. So that if the court does not carry it into execution, it cannot be done at all; yet if there are strong and material objections, the court ought not to do it. Lord Chancellor could not say this was strictly contrary to the provision of the statute of mortmain; the first clause of which was intended to relate to gifts or conveyances to a charity by way of donation. The legislature did not intend absolutely to forbid all kinds of purchases of lands for the benefit of a charity, but has put them under some restrictions. The *proviso* was inserted in the House of Lords upon mention of *Queen Anne's Bounty*, which could not otherwise have gone on; the statute was not intended to prevent the execution of charities then already established, in several of which the funds were vested in trustees, to be laid out in land, (particularly *Dr. Radcliffe's* charity,) but to leave them open, and restrain their future increase, that it should not be in the power of any court or person to direct subsequent gifts to be laid out in land. Lord C. said there was something in this case which might make a great opening to evade the act, although testator might not have intended any such fraud. But if such a precedent were made, it would be followed by any person who knowing that if he died within a year after the conveyance, the act would make it void, might give the exact value thereof in money *the same way*, and then the one to be laid out in the purchase of the other. Though the statute of mortmain was mentioned as a barbarous act, his lordship said it was quite otherwise: it prohibits not charitable foundations, but only restrains the method, leaving the disposition of personal property entirely free. The particular views of the legislature were two: first, to prevent the locking up of real property from being aliened; and secondly, to prevent persons from being imposed upon *in extremis* to give away their lands from their families, by which persuasion the popish clergy got half the real property of the kingdom into their own hands. As to the other view, his lordship said it was of the last consequence to a trading kingdom, to which the locking up of land was a great discouragement; that indeed had not its due relation to the statutes of mortmain; for services to the crown were more regarded, and therefore

Queen Anne's Bounty is for augmenting poor vicarages by purchases of land.

Vide Durrour v. Motteux,
2 Ves. 320.

therefore the reasoning of producing that act was more like the political reasoning relating to the stat. of *Westm. 2.* of entails. With that view of the legislature, it would be inconsistent if the court should decree the order made on the Master's report to be carried into execution in the purchase of land. Where such a charity is created *de novo*, it is the better rule to lay it out in some personal property, for which the funds are convenient, affording commonly a better and readier income than land; and his lordship observed, that so early as the third century laws were made by one of the first Christian emperors to prevent the mischiefs of mortmain. The estate in this case was devised to tenants in common. The share of one of them was gone over to his issue in tail, an infant, against whom the court could not make a decree; neither could the court make such a decree if he had been of full age, for equity cannot compel the execution of a contract in the lifetime of a tenant in tail, for the purchase of lands, and that he shall suffer a recovery. The present was not the case of a private person, but of a charity, and the court would not decree the money to be laid out in the purchase of an undivided moiety of an estate, obliging the charity to become tenant in common with a private person, whereas the reasons for laying it out in this case were to have it entire. The present estate was inconvenient and entangled, and not for the benefit of the charity. Lord Chancellor said, the only mode to carry the purchase into effect was by a private act of parliament, enabling the infant to convey; if the parties meant to apply for such an act, the cause should stand over, otherwise the information must be dismissed.

2 Aug. 1750, cor. Hardw. C.
Attorney-General v. Whorwood,
Whorwood v. University Coll.
Oxford, 1 Ves. 534.

10. *T. W.*, by will, devised the remainder of his real and personal estate to *University College*, and by a codicil annexed particular regulations, viz. that if there be a senior fellow of the college, a divine, of the age of 40, and of good reputation, he should be the possessor of all his (testator's) estate and the furniture of his house at *Denton*, to keep it in repair, not to sell timber without consent of the college, to live hospitably, and sometimes give entertainment to the poor, to distribute cordials and drugs to them when needful, to give them some books and pamphlets of good morals and piety,

and to give an annual entertainment to the fellows: if he prove dissolute, then the election to be void, and another proceeded to. Objected that the devise in the testator's will did not amount to a charity, but a trust only. Lord Chancellor—If this trust is no charity, there is no ground for an information in the name of the Attorney-General; for such can only be supported on the ground of a charitable use. His lordship would not determine if the devise in question was a charity, but left it to go before the court on its own circumstances. His lordship said, the establishment of learning is a charity, and is so considered on the statute of *Eliz.* A devise to a college generally for their benefit to increase the foundation, and advance the ends of the institution, to augment an headship or fellowship, or found a new one, is a laudable charity, and therefore they were excepted out of 9 *Geo.* 2.; but the present is not a devise for academical collegiate purposes, but only to establish somebody to live in testator's house, and make his estate unalienable; apparently answering no good either to the college or the public. It is necessary, therefore, to consider what may be the effect of this devise, and the consequence of it as to any power in the crown to direct the uses of a charity, improperly provided for in itself, and how far the testator's direction of fixing a senior fellow, and providing for him in this manner, is inconsistent with the constitution of the college as to residence, &c. ? for if so, it is contrary to the intent of the trust, which was, that there should be a continuing fellow of the college, not barely when he is elected. Then a *quære* will arise, whether, if the present is not a good charitable use within 43 *Eliz.*, it will stand as a devise to the college generally, as to a body capable of taking? That will depend on the power they have to take in *mortmain*, and it is necessary also to ascertain that power, that the whole may be before the court when the trust comes to be determined. The Master was directed to inquire into that fact, and whether the regulations of the testator were consistent with the college statutes, and report accordingly.

Vide Attorney-General v. Baxter, 1 Vern. 248. where Lord North held the trust did not result to the heir, the crown having the power to direct in what manner the charity should be applied.

11. Where trustees have power to distribute generally according to their discretion, without any object pointed out or rule laid down, the court of

5 Dec. 1750, cor. Hardw. C. *Gower v. Mainwaring*, 2 Ves. 89.

of Chancery interposes not, unless in case of a charity, of which the court have a general government and regulation.

25 June 1754, cor. Hardw. C.
Frost, &c. of Edinburgh v.
Aubry, Ambl. 236.

12. Devise of 3500*l.* *South-Sea* annuities to plaintiffs, to be applied to the maintenance of poor labourers residing in *Edinburgh* and towns adjacent. Lord *H.* thought he could not give any directions as to the distribution of the money, that belonging to the jurisdiction of some of the courts in *Scotland*; his lordship, therefore, directed that the annuities should be transferred to the appointers of the plaintiffs, to be applied to the trusts of the will.

26 July 1754, cor. Hardw. C.
Attorney-General v. Governors of
Harrow School,
2 Ves. 551, 552.
Case of Harrow and Edgeware
Roads.

13. *John Lyon*, in the reign of Queen *Elizabeth*, gave certain lands to defendants in trust to employ the rents and profits yearly towards repairing and amending the common highway from *Edgeware* to *London*, when and in such manner as they should think fit; and if it should happen that the said highway should be sufficiently amended or not to require the whole profits to be laid out, then and so often the governors should lay out on the road from *Harrow* to *London* the whole or so much as should remain after repairing the *Edgeware* road. The present information was grounded on the expenditure of those profits on the *Harrow* which should have been all laid out on the *Edgeware* road. Defendants objected to the jurisdiction, which they contend proceeds only in cases where a charitable commission could issue, and which in this case could not, from the proviso in 43 *Eliz.*, and that in a foundation of this kind, where no special visitor is appointed, the visitatorial power results to the founder's heir (a). Lord Chancellor allowed that defendants, by being made governors, were not visitors; but as to the point of jurisdiction, the court had taken it otherwise than as insisted upon, and had interposed, as appears by a decree of Lord *Ellesmere* in 1611. The construction of that clause in 43 *Eliz.* is, that where a college, hospital, or school is founded, a special visitor appointed, or a visitor by operation of law, the commission by virtue of that statute should not interpose. If, therefore, this information was for the revenues of the school, that objection might arise; but it is a distinct charity from the school, a collateral trust; and upon that distinction the above decree

(a) *Vide* Case of *Birmingham*
School, 2 P. Wms. 325.

decree has proceeded. Yet his lordship did not see what decree he could make upon this information; and he thought the founder intended to leave it in a great measure to the discretion of the governors, though not absolutely, if they acted partially or corruptly. The *Edgeware* road had had the aid of two turnpikes, which the *Harrow* road had not; and it appeared in evidence that it was in very bad repair. His lordship stated the question to be, if the trustees have not done rightly in thinking the *Edgeware* road so good as not to want the assistance of the charity that the other did? but how can the court interpose in contradiction to the intent of the donor, which was to leave it in the sound discretion of these judges, and where they act fairly a court of justice would do too much to control them; besides it would end in a trial between the two parishes which of the two roads wanted it most. Though his lordship would not make a decree, he would not dismiss the information, but still keep a hand over the defendants.

14. In 1716 Sir *George Downing* conveyed his estate to trustees to prevent dower, and then married. Afterwards, by will dated 20th of *December* 1717, he devised to trustees divers lands, freehold, copyhold, and leasehold, for several life-estates, with remainder finally in default of certain issue, to the same trustees and their heirs, in trust out of the rents of said lands to purchase the inheritance in fee-simple of some piece of ground in *Cambridge* proper for erecting a college within that university, to be called *Downing College*, and that a charter should be applied for to incorporate the same; and when founded, that the trustees should stand seised of the lands to be so purchased for the use of the collegiate body and their successors for ever.

Testator died in *June* 1749 without revoking or altering this will, but by a codicil charged his estates with two annuities. All the devisees for life dying without issue, the estates devised became applicable to the purchase of land to found the college. The trustees all died in the testator's lifetime. The testator's cousin, Sir *Jacob Garrard Downing*, was his heir at law and executor, who dying and leaving *Margaret* his widow and executrix, she claimed the leasehold estates, and the freehold

T. 1769, cor. Camden, C. and assit.

Attorney-General v. Lady Downing & al. Amb. 550. 571.
Case of Downing College.

Higbmore on Mortmain, 134. more fully stated.

Vide Attorney-General v. Bowyer, 3 Vef. jun. 714 to 731.
et post, which is another case on the same will.

freehold and copyhold were claimed by the surviving heirs at law of Sir *George Downing*. The copyhold lands had never been surrendered to the use of the testator's will.

On an information at the instance of the chancellor, &c. of the university of *Cambridge*, to establish the will and confirm this charity, it was set forth in Lady *Downing's* answer, that Sir *G. Downing* purchased several freehold estates after the making his will; that the whole lands were charged by the codicil with two annuities, and that the personal was not applicable thereto. That Sir *J. G. Downing* found the estates in ruinous condition at the death of Sir *G.* and had laid out 30,000 *l.* in improvements; that part of the lands devised were held under lease from *King's College*, and from the *Dean and Chapter of Ely*, some of which Sir *George* had renewed, and some had expired in his lifetime since making his will; and other of said lands had come to him only by mortgage.

The several points that were the principal subjects of argument were as follow:

(a) *Attorney-General v. Hickman*, W. Kel. 34. *Duke*, 87. *Finch*, 145. *Attorney-General v. Syderfin*, 1 Vern. 224. were cited.

1st, Whether the trusts were not lapsed by the death of all the trustees in the lifetime of the testator (a)?

2d, Whether the devise for the erection of the college was a charitable use, and protected by 43 *Eliz.* or void under the statute of mortmain?

3d, Whether the devise was within the 9 *Geo. 2. c. 36.* the will being of a prior date to that act, but testator having died since? And

Vide Case of Sutton Hospital, 10 Co. 1. where it was held, that though the corporation was not in existence, the purpose being good, the heir of the founder has no interest.

4th, (Which was the great question in the cause,) Whether a devise to a corporation not *in esse*, and the existence of which would depend on the will of the crown, (supposing it a charitable use,) could be established by a court of equity?

Besides the foregoing, there were several subordinate questions; as,

1st, Whether the copyholds not surrendered to the use of the will passed by way of appointment or not?

2d, Whether the leasehold renewed after the date of the will passed?

3d, Whether the real estate was charged with certain annuities, in exoneration of the personal, or only as an auxiliary fund?

(b) *Note*; This point does not seem to have been seriously contested.

4th, Whether the university had any interest at stake so as to sustain the question (b)?

§6. *How far controlled in Equity—Doctrine of Cy pres. C—2 97*

5th, Whether certain erections (as barns raised on rollers) among the improvements on the estates by Sir J. G. Downing, were to be considered as fixed to the freehold, or part of the personal estate of Sir J. G. Downing?

6th, Whether the limitations in testator's will were of trust estates or of uses executed? (c).

(c) Note: Of this the court seemed clearly satisfied, holding them to be trusts such as related to the intended new college.

7th, Whether the codicil was a republication of the will, so as to pass certain after purchased lands?

8th, Where certain lands, mortgaged to Sir G., and of which he had been long in possession, though the equity of redemption was not released or foreclosed, passed by the will?

As to the four principal points that arose: On the first, some cases were cited, which induced the court to be of opinion that the trusts were not lapsed by the death of the trustees in the lifetime of the testator. And Camden, Chancellor, said, the death of the trustees is immaterial, as there are persons now living that may apply to have the trusts carried into execution; and he mentioned the case of *Burgefs v. Wheat*, where a devise was executory, the heir was compellable to carry the trusts into execution; where those trusts are meritorious, the court always considers the trusts as existing, though the trustee is dead.

On the second principal point, the following cases were cited: In *Porter's Case*, 1 Co. 24, it was determined that a gift for the augmentation of the university was a charitable use, and therefore not within the statute of mortmain; *Duke*, 74. 77. 81. 83, 84.

On the third principal point, the case of *Carvel v. Carvel* was cited, in which a devise not attested was held good, being dated before the statute of frauds, the testator dying after that statute.

On the fourth and chief point, it was urged for the university, that if the objection was founded, that there was no object *in esse*, it would hold in all cases where a trust is for a general purpose.

See the arguments on this point fully stated in Highm. on Mortmain, 138.

Mr. Yorke admitted that this case was new *in specie*, but not *in genere*, and that the devise is not void for want of a proper object; for the object is pointed out; it is a present devise upon an executory trust; and being so, it is not material whether the licence precedes or follows the trust (d).

(d) *Vide* The cases of St. John's and Sydney Colleges, where the licences were subsequent to their foundation.

Per Camden, C.—"The trust of the charity in question ought to be carried into execution, in VOL. II. H "case

"in case his majesty should grant a charter of incorporation, and license to take the devised premises in *mortmain*," the will having been established by a decree, under which the heirs at law were at liberty to apply to the crown for that purpose. The freehold estates purchased by the testator after making his will, did not pass by the codicil; the will not being thereby republished, and the leases renewed, or run out after making the will and before the testator's decease, did not pass by the will, but fell into the residue of his personal estate. The copyhold estates, not surrendered to the use of the testator's will, descended to his heir at law. The annuities given by the codicil ought to be satisfied in the first place out of the personal estate, and the real was only charged therewith in case the personal was deficient. His lordship referred it to the Master to inquire the annual value of the premises devised to the charity, to enable the heirs at law to form a judgment what number of fellows and scholars could be maintained by the endowment; and they were to be at liberty to contract for a piece of ground within the university of *Cambridge*, whereon to found the college conditionally, in case the charter and licence should be granted; and it being suggested that certain erections on part of the devised premises were so constructed as to be movable, the Master was to enquire into the nature of them, and state his opinion thereon to the court; and also into the state of testator's unredeemed mortgages, &c.

Note; Under this decree Lady Downing and her representatives acquiesced for upwards of twelve years, and so well convinced was she of the rectitude of it, that she enrolled it herself. But in March 1781, a bill of review was filed, but the demurrer thereon was never argued, with intent to appeal to the House of Lords; but no appeal has been since made.

T. 1778, cor. Thurlow, C.
White v. White,
 1 Bro. Ch. Ca. 12.

15. *Richard Holt* bequeathed one half of the residue of his personal estate, which was considerable, to the *Foundling Hospital*, and the other to the "*Lying-in Hospital*, and if there should be any more than one of the latter, then to such of them as the executors should appoint." He afterwards struck out the name of the executor, and never inserted another, and died in 1775: the next of his kin took out administration, with this testamentary paper annexed. Lord Chancellor *Thurlow* said—It seems if this had been a private legacy, and a selection of objects out of which the legatee was to be chosen, it is allowed, that it would be of the essence of the legacy, and it could not take place unless

§6. *How far controlled in Equity—Doctrine of Cyprus.* C—a 99

unless there was an expression of general favour to let in all the objects. His lordship thought, that in the case of charities, this court derives a great latitude of authority from the extensive nature of most charities, because they cannot go upon the same strict rules which prevail in private cases. But that is well resolved into the purpose and the mode. When the testator is willing it shall go in the largest extent, the court will follow his intent in marking out objects. His lordship wished to follow this method in construing the intent of testator. He had stated a distinction between charities and private cases, so as to lay down a latitude more wide than is to be wished to be left to courts of justice. In the *Downing College* case*, the difficulty was, that when the anterior estates were spent, there was nobody to take the equitable dominion, and the question was, Whether the analogy held between it and a legal estate, with nobody to take, which descends to the heir at law till an object arises? Even in private cases, the distinction between the object and the mode has been attended to. His lordship said, he would look into the cases, whether selecting one out of the objects is regulating the mode only.

In *July* following his lordship gave judgment.

The question is here, Whether the legacy is void, the executor's name being struck out, and there being no person on whom it could devolve, or whether the court will sustain it?

It has been argued, that the court has great extent of jurisdiction in making legacies certain, which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been at all times an exercise of this authority, where a legacy has been doubtfully given, as in *Attorney-General* and *Sydesen*, which was a legacy to such charitable uses as *he had appointed*, but the appointment was not found; the court decreed the charity to be directed by the crown, as there had been no appointment. In *Wheeler* and *Sheer*†, in Lord King's time, there was no appointment, but the testator had procrastinated the legacy: that evidence satisfied Lord King, that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution. The cases have proceeded upon notions adopted from the *Roman* and civil law, which are

* Ambl. 550. 571.

1 P. Wms. 674. 425.
Finch, 194. 222. 245.

† Mos. 288. 301.

very favourable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object. From *Swinburn* down to Lord *Hardwicke's* time, that would be the effect where the object is disappointed: but the present case is different; here the testator giving a legacy to the next of kin, and to the executor, names a particular charity, a residuary legatee; the question is only, How the trust shall be carried into execution? Lord *T.* remembered to have read a case somewhere*, where a legacy is given to *B.* for the benefit of non-conforming ministers, with the advice of *C.* and *D.*: at the testator's death *B.*, *C.* and *D.* were all dead, yet the court sustained the legacy. His lordship therefore referred it to the Master to consider to which of the lying-in hospitals the legacy should be paid; and he afterwards ordered it to be paid to one which the Master reported to be most proper. The sum was large.

* *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193.

P. 1785, cor. *Thurlow, C.*
Attorney-General v. Cowper,
1 Bro. Ch. Ca. 439.
Case of Blencown School.

Vide *Attorney-General v. France*, cor. *Eyre, B.* in 1780, where there was a similar devise, and Mr. Baron *Eyre* thought the circumstance of inhabitancy so material that he removed the trustees on that ground only.

13 July 1786, cor. *M. R.*
abf. *C.*
Attorney-General v. Bishop of Oxford, 1 Bro. Ch. Ca. 444. (n.)
Case of Wheatley Church.

16. Information for removing trustees of a charity-school at *B.* The founder had devised lands to trustees for the purpose of supporting the school, and had directed that so often as his trustees should be reduced to two, those two trustees should nominate certain persons, being inhabitants of Great or Little *B.* Objected, that the trustees appointed were not inhabitants of either of the *B.'s*. Lord Chancellor—This information should have shewn that there were proper persons in *B.* to be chosen trustees, and there being no such evidence, the information was dismissed with 40 s. costs.

17. *T. S.* by will bequeathed his personal estate as follows: "I give and bequeath to my executors 100 l. each for their trouble; and all the rest and residue of my personal estate I give and bequeath to them in trust, to apply the same to build a church at *W.* where the chapel now is, in the manner I shall hereafter direct, and for want of direction, as my executors shall think best." The information prayed a general account and direction touching the plan and execution of testator's charitable bequest. The Bishop of *Oxford*, as patron of *C.*, opposed the erection of a new church, unless the surplus of the residue could be applied to augment the chapelry annexed. The chapel-warden answered to the same effect, and proposed repairing

§6. *How far controlled in Equity—Doctrine of Cy pres. C—a 101*

repairing the old chapel, and with the surplus to augment the chaplain's salary. The next of kin insisted that a new church or chapel must be built, and claimed the surplus to themselves, contending that the intention of the testator must be implicitly followed, and that if the bishop would not allow of a new chapel, the bequest should be void and the money divided. *His Honor* said, if the bishop objected he could not interfere. As to repairing, &c. he could not do that. The intention must be implicitly followed, or nothing could be done. However, his Honor referred it to the Master to take an account, &c. and to make a special report as to the plan of erecting a new chapel, and the expences attending it, and also with respect to the bishop's assent.

18. *Dr. Radcliffe*, by will 13th September 1714, devised his manor of *Linton*, and other hereditaments in *Yorkshire*, to his executors and their heirs, in trust, to pay thereout yearly 600*l.* to two persons, to be chosen out of the university of *Oxon*, where they are masters of arts, and entered on the physic line, for their maintenance, &c. as travelling fellows; and the yearly surplus for ever, for buying perpetual advowsons for the members. He then charged several annuities on his *Bucks* estate, and gave his lands in *Bucks*, &c. and all his real and personal estate charged with said annuities, &c. to his executors, their heirs, &c. and willed that all the residue and surplus thereof should be applied by them to such charitable uses as they in their discretion should think best, but no part to their own use, and desired that if it could be done in law, his *Yorkshire* estate should be conveyed and settled by his executors on the master and fellows of *University College* for ever, in trust for the performance of the uses therein before declared.

An information had been filed and decree made in 1716, that the trustees should convey the *Linton* estate to the college; which had been done. The estate for long time did not produce more than would pay the travelling physicians; but at length producing a surplus, the college, in obedience to the will, purchased advowsons till they possessed as many as the statute of mortmain, 9 *Geo. 2.* would allow, (*viz.*) a number equivalent to that of a moiety of the fellows. A surplus still continuing to arise, the college (under the idea that they could not purchase

H. 2789, cor. *Thurlow, C.*
Attorney-General v. Green, and
University College, Oxon,
2 Bro. Ch. Ca. 492.
Case on Dr. Radcliffe's Will.

chase more advowsons) laid out part in increasing the value of the livings already purchased, and in adding to the income of the headship of the college.

The present information was filed against *Gran* the heir at law, and the college, praying a proper application of the surplus profits not laid out in the purchase of advowsons under the will.

The heir at law claimed the surplus as undevised, and therefore a resulting trust for him. The college submitted, whether the devise being before the mortmain act, they might not purchase advowsons, though to a greater number than that of a moiety of their fellows? If not, they insisted the surplus should be applied to other uses for the benefit of the college, as being the nearest possible application to the intent of the testator.

Lord Chancellor—The point in question was with respect to the charity itself. The court had had a plan laid before it, supposing the whole object of the charity to fail, and yet that the estate is by the will appropriated to charitable uses, still the will is a clear exclusion of the heir at law. It is under this idea, that many charities have been disposed of under the privy seal. Is then the heir disinherited? He is to claim a trust not resulting from the will, but from the act of the legislature. If there be any case where the heir at law is disinherited, it must be that where the devise was good at first. In the first decree, the devise was held up till the licence to hold in mortmain should be obtained. So it was by Lord *Camden* in the *Downing College case* (a), which licence has never yet been obtained. Considering the words of the last clause of the act, it is difficult to make it out that there is such a limitation as is contended for; but it has been so constantly understood the other way, that his lordship did not think himself warranted to hold a different opinion. He did not see why some arrangement should not be made by way of exchange of advowsons, but it is not necessary to declare that now. If that should fail, the question between the general trustees and the heir at law will then arise; it will be difficult to obtain it for the heir at law, and perhaps as difficult for the general trustees. If all these should fail, it may be a question, Whether it is become fiscal, or will go to the heir at law as resulting to the founder.

(a) Ambl. 550. 571.

§6. *How far controlled in Equity—Doctrine of Cypres. C—2103*

19. Where summary powers are given to the Lord Chancellor by a private act of parliament, to make regulations for a charity, he cannot vary the foundation and general constitution of the trust, that being the proper business of parliament.

T. 1789, cor. Thurlow, G.
Ex parte Bolton School,
2 Bro. Ch. Ca. 662.

20. Stock being fluctuating in its nature, cannot be appropriated to the support of a permanent charity, but must be sold, and the money arising appropriated.

T. 1789, cor. Thurlow, C.
Isaac v. Gompertz,
1 Ves. jun. 44.

21. Testatrix bequeathed to A. (who was not one of the trustees for the general purposes of her will) his executors and administrators, all the residue of her personal estate, desiring him "to dispose of the same in such charities as he thinks fit, recommending poor clergymen with large families and good characters." A. died 9 years before the testatrix, who had full knowledge of his death, but never made any alteration in her testamentary disposition. The question was, Whether that charitable bequest could be executed by the court? *Per Lord Chancellor*—It is clear that this residuary bequest cannot be qualified as a bequest for A.'s own use: he cannot claim for himself under this will. Where a legacy is given only to erect a charity, the legatee is a trustee at all events, and can have no pretensions for himself. The circumstance of A.'s death between the time of making the will and the death of the testatrix, and her consideration of that, must not direct the construction of a will. A will cannot be construed by subsequent circumstances. It is universally known that a trust legacy cannot lapse by the death of the trustee, but that it survives for the benefit of the *testuy que trust*. There are many cases where the most general gifts for charity have been executed. The circumstance that the trustee is unable by death to dispose of it, makes no difference, because it is a power given to a person. Suppose there was no gift, but only a power to the executor to dispose to such and such charities, there the charities survive; but here it is much stronger, because the testatrix has recommended a more particular charity than the general one. In that view it is impossible to say the charity must not be sustained. Referred to the Master to settle a plan, having particular regard to the recommendation of the testatrix.

8 May 1792, cor. Thurlow, C.
Moggridge v. Thackwell,
1 Ves. jun. 464.

T. 1793, cor. Thurlow, C.
Attorney-General v. Hartley,
4 Bro. Ch. Ca. 412.

22. *Samuel Travers* esq. in 1724 (before the statute of mortmain) gave real and personal estates to his executors, in trust, to settle an annuity of 60*l.* per ann. on each of seven superannuated or disabled lieutenants in the navy, to be added to the 18 poor knights of *Windsor*, and gave the residue of his estates for the maintenance of boys in *Christ's Hospital*, and for educating them in mathematical learning. After testator's death several suits were brought touching his affairs, and then sometime about 1763 his nephew and surviving executor *Samuel Houlditch* died, having made his will, reciting that he had taken extraordinary pains and care in executing the will of his late uncle, but lest in the course of so long a transaction and in such intricate and weighty affairs there should happen to be any misapplication, or any other matter which might frustrate his late uncle's intentions as to the mathematical school at *Christ's Hospital*, which he considered the best of all his uncle's donations, he (*Houlditch*) by his said will gave 8000*l.* stock to be transferred to the credit of the present cause, (which was then existing,) to be applied to the uses of the last will of the said *Samuel Travers*, and 2000*l.* (money) to the uses of the said last will of the said *Samuel Travers*, both of which sums he directed to be applied under the directions of the court of Chancery. The present bill stated, that the estate and effects of said *Samuel Travers* being more than sufficient to answer the charitable purposes of his will, the 8000*l.* and 2000*l.* given by the will of *Houlditch* ought to be applied to the use of the mathematical school of *Christ's Hospital*. On the part of the residuary legatees it was contended, that at the time of making *Houlditch's* will the gift to the poor knights would not have been valid, but that the estate of *Travers* being sufficient for the purpose, put it out of the case. Lord Chancellor said, if the testator might be allowed to explain his own meaning, the court could not apply the legacies to any other charity than *Christ's Hospital*. A question might have been made, if the estate of *Travers* had not been sufficient to establish the charity for the poor knights; but when the gift is to two purposes, the one good and the other bad, the court will never apply it to the use that is bad.

8 July 1793, cor. Loughb. C.
Blundford v. Tackrell,
2 Ves. jun. 238.

23. Testator gave all his real and personal estate to trustees, with directions that a commodious and

§ 6. *How far controlled in Equity—Doctrine of Cypres. C.—a 105*

and proper house should be taken by them on lease as a school, and that the children and grandchildren of his relations, of the description specified, should be placed there for education at the age of seven and until fourteen; then to be placed out as apprentices with a suitable fee. He also directed that such other children should be placed there, as the trustees should think fit, and that the foundation should be under the visitation of the mayor of B., and that there should be an inscription of the founder's name and benefaction over the door. The heir and next of kin claimed in opposition to this trust under the statute of mortmain. *Per Lord Chancellor*—The testator certainly intended the trustees should either purchase or take a lease. He was aware of the statute, and trying to get out of it. He meant a permanent establishment. The inscription of his name and benefaction were the *indicia* of charitable vanity. The court was not to find means of evading the law. The statute of mortmain meant to prevent a person from adding *by will* to land already in mortmain; but if a man was charitable, and chose to divest himself *by deed*, he might. Lord Chancellor said, that though this charity could not take effect as a general charity, he would not condemn the whole will, but would give effect to the testator's particular bounty to his relations. The first purpose of the will was not to be condemned, because the testator looked forward to a general establishment. His first object was to form a scheme of education for these children; and there could be no objection if he had educated all the children in the town at the same time. The trustees have starved the first object by their attention to the ulterior. The education and the allowance at fourteen should be as liberal as the fund would afford.

On behalf of the heir at law and next of kin of the testator it was contended, that if the court should consider the charity in this case as a personal benefit to the relations of the founder, it must be confined by the rules of law to the lives of persons in being at the time of the will; and that grandchildren, descendants of persons not in being at the time of the will, were not objects. *Per Lord Chancellor*—The wisdom of the law has fixed the time, which is 21 years after lives in being; up to that time there may be any number of springing uses. A legacy may be given to the grandson of A. born

4 Bro. Ch. Cs. 394.
S. C. *nomine Blandford v. Fackerell*.

Vide Attorney-General v. Tyndall, Ambl. 614.

A. born in the life of *A.*; it is a good description of the legatee, and he would take within 21 years after the life of the person in being. Here the bounty ceases at the age of 14. The rule of law admits of 14 years after the determination of lives in being, and goes to 21 years. Therefore all the children and grandchildren born in the lives of the different stocks mentioned in the will may be within the bounty without breaking in upon the rule of law. Lord Chancellor would only carry it to the several stocks existing at the time of the testator's death, and the children and grandchildren born in their lifetimes. The person within the rule would be a child or grandchild of any of the stocks existing at the testator's death. From their ages of 7 to 14 they would be entitled, and then there would be an end of them. A child or grandchild may be born just before the extinction of one of the persons who made the stocks, then the benefit would only go to the age of 14, and that would not be against the rule of law. Lord Chancellor referred it to the Master to take an account of testator's real and personal estate; and his lordship declared the disposition, as far as it went to establish the charity, void by the statute; and his lordship put it so, because he did not mean to prevent them from taking other children as long as the school was to be kept open for the children and grandchildren of the relations who were to take under the disposition, so far as the objects were not too remote. The dispositions (except as aforesaid) Lord Chancellor declared to be a trust for the heir and next of kin. His lordship further directed the trustees to lay a plan before the Master for carrying into effect the dispositions of the will, according to that declaration by the education of the objects pointed out; and the Master was directed to enquire who were the objects of the testator's bounty according to that declaration.

14 July 1794, cor. M. R.
Attorney General v. Boulton,
 2 Ves. jun. 380—391.
Case of Polesworth Vicarage.

24. Sir *Francis Nethersole* by lease and release in 1653 conveyed the vicarage house of *Polesworth*, with several impropriate tythes, &c. to sundry persons ministers of the gospel, to hold to them upon trust (among other things) to permit the vicar of *P.* for the time being to dwell therein, provided he should be there settled at the nomination of the existing trustees, or the owner of the inheritance for the time being; and further, that the existing

trustees

trustees should place a sufficient schoolmaster and schoolmistress in the edifice covenanted by Sir F. N. to be erected for their habitation; and further, to dispose of the rents and profits of the premises so conveyed for the maintenance of the said schoolmaster and mistress for ever, to teach the children of the parish of P. to read, write, and work, and to instruct them in the christian religion, and to such other pious and charitable uses as Sir F. N. should by his own experience find to be most conducive to the advancement of the true religion, and most beneficial to the poor of P., and as he should by any writing or by will declare and appoint, and in default thereof upon trust that the existing trustees should yearly dispose of the rents of the said estate, either for the increased maintenance of the vicar of P., who should be nominated by the trustees, or for the maintenance of the schoolmaster and mistress, or for the repairs of the school, or for other purposes therein directed, or for any other pious and charitable uses as should be termed most expedient and most likely to be continued in perpetuity and declared by the future existing trustees; and there was also a direction for keeping up the limited number of trustees. The only proof of a declaration of uses by Sir F. N. was a book in the custody of the trustees in which their proceedings were entered. In that book was contained an order of the trustees, dated six years after the creation of the trust, that the declaration of the founder (to the effect before stated) be then entered as a direction to the trustees. To the founder's entry of his declaration there was neither date or signature; but the trustees admitted that they and their predecessors always considered the said declaration as a direction to them for executing the trusts, and always executed it accordingly. In 1779 the vicar of P. being very old, the trustees by memorial to the Lord Chancellor (the presentation being in the crown) represented the great age of the incumbent, and requested that upon a vacancy his lordship would appoint a clergyman recommended by them. In 1787 the incumbent died. Between his death and burial one of the trustees waited on the Lord Chancellor, but not seeing him he left a letter, informing his lordship of the incumbent's death, and requesting him to wait a short time for the recommendation of the trustees. No step was taken by

by the trustees for two months, when the Lord Chancellor, without any recommendation from the trustees, issued a *fiat* for the presentation of *W. R. N.*, who was instituted, and soon after inducted. The trustees then refusing to admit *W. R. N.* to the benefit of the trust, the present information was filed upon his relation. The trustees by their answer represented, that one of them being absent, they deferred meeting till his return; and that upon his return they did not make any recommendation, finding that the relator had been presented by the Lord Chancellor in the mean time. The answer also stated, that since the foundation of the trust in 1653, none of the subsequent vicars had been presented, but by the recommendation of the trustees, except one *J. B.*, who being presented without such recommendation was not permitted to reside in the house, or enjoy the tithes or the rent of the land, but by articles in 1663, reciting that he became vicar without such recommendation, and that he was thereby incapable of enjoying those benefits, and to settle all disputes about the matter during the time he should be vicar, on his releasing all claim under the trust, one of the trustees, out of the respect he bore him, covenanted to pay him *5 l. per ann.* so long as he should continue vicar. Defendants the trustees therefore contended, that the present relator was not entitled to the benefits intended for the vicars of *P.*, and representing that they were preparing, according to their powers, to apply the fund to other charitable uses, submitted to dispose thereof as the court should direct. On an inquiry directed by his Honor as to the dates of the deaths of the vicars of *P.*, and the recommendations of the trustees, only two were found which had been accepted, one in 1747 and another in 1758. *Per M. R.*—This case is attended with circumstances so different from any that have yet been before the court, that it becomes necessary to see whether the principles upon which charities are administered in this court, which has been done with great liberality to the intention to carry that as nearly as possible into execution, might not, if applied to the present case, decide the decree that ought under the circumstances to be made. It is not material that the conveyance was made during the usurpation, when the church was in a very unsettled state, though stress was laid on that in argument. That deed

deed was only meant as a relative deed, to make a provision if Sir F. N. did not alter his intention. He used the word "*settled*," which was one of the parliamentary words used in the general power given to dispossess all persons obnoxious to the existing government, and to put in others. It must now be presumed there was a declaration of his intention before his death. The original is lost, but a jury would presume it from the evidence of the book, which, though without date, is very ancient; and the trustees conceiving it to be cotemporary with the constitution, regulated themselves by it. That entry must now be presumed a declaration. It was insisted, that there was a distinction both in the deed and the declaration between the habitation and the other benefits, and that it was more positive as to the former. His Honor thought it not necessary to decide that point, according to the opinion he held; though it would be necessary, if he thought himself not warranted, to give what was intended for the ministers to this vicar, though he had not the approbation of the trustees. By the first instrument it was plain Sir F. N. had left every thing to the discretion of his trustees, except the habitation of the minister, and he was to have only such portion of this charitable gift as the trustees should think it; but if that declaration, which his Honor thought was evidence of his intention, was to govern, provided the vicar was entitled to any thing, he would be entitled to the tithes and other provisions as well as the house. Then it was insisted, that all the conditions that respected the approbation, procurement, or nomination of Sir F. N. or his trustees, could apply only to the vicars or ministers who came in under the same or similar circumstances to those in which they were then placed; and that though he had that jealousy of the then reigning powers, that he made the consent of his trustees necessary, *non constat*, that he intended any such shackles to be put upon those entitled to the presentation in happier times; that it would be a reflection upon the great seal; and therefore whatever was the case before, circumstances were now changed so that the condition was totally gone. His Honor by no means agreed to that: he said, it was difficult to know what Sir F. N.'s private intention was; and the particular reason that induced him to think it desirable that the minister should come in with the approbation

approbation of the trustees. His Honor was inclined to believe, that Sir *F. N.* had then the nomination to the vicarage, but that did not appear, and it was admitted that the right of presentation was in the crown. One would have supposed, that his jealousy arose from his having it; and that he meant to say, if they would permit his man to come in, he should have it; but if they went on *settling and unsettling*, then his trustees should consent. His Honor was willing to admit, that if all due diligence was used by the trustees to procure a person to be approved by them, and yet a person was instituted who wanted the qualification which had been made the criterion, that person would not be entitled. There was nothing illegal in this. Testator had a right to give these estates as he thought fit. He had first marked out a general charitable purpose, then directed this specific application of part, subject to the proviso; and if there was no such approbation of the trustees, then to some other charitable uses. He had a right to say so. His Honor believed there were other instances of the same sort of condition, and that the great seal had never thought it derogatory or improper; for it was stated by the trustees, and must be taken to be true, that in all instances (a) the recommendation was accepted; and in the two last instances in 1747 and 1758, it is actually proved, that the recommendations to Lords *Hardwicke* and *Northington* were accepted. It is unpleasant to a judge to be left without any guide merely to say, whether under all the circumstances proper diligence was used by the trustees to avail themselves of their right. That depended entirely upon the circumstances and facts. One fact, which did not appear at the hearing for want of the dates, was very material. His Honor had desired to know what had been the practice, which would in a great measure constitute the rule. He thought it would be strange to say, the trustees might wait, and make the recommendation whenever they pleased, and that the great seal and the intention of the donor were to wait the discretion of the trustees. He could not think that this court would not have permitted such conduct in them; therefore he wished to know whether this court or any other authority had prescribed any rule. He then desired to know the dates of the deaths of the vicars and the recommendations. The recommendations in 1747 and 1758 were both on the

(a) In the instance of the presentation of *T. B.*; which was without the recommendation of the trustees, it does not appear whether they neglected to recommend, or whether their recommendation was ineffectual.

§ 6. How far controlled in Equity—Doctrine of Cy pres. C—a 111

the very day the prior incumbent was buried. The latter was very material, because the very same circumstance occurred that has been assigned in this case as the reason of the delay*. In these two instances the trustees did so much suppose it incumbent on them to be as quick as possible, that the very day of the deceased clerk's burial they met, and agreed upon a recommendation, which the great seal accepted. As to the others, there was no account about them. The memorial to the Chancellor in 1779 did not recommend any particular person; but was meant merely as a caution upon their part. His Honor took it for granted the memorial was delivered, though there was no evidence of that. As to the reason assigned for delaying the meeting till the 22d of December, there was no proof when the absent trustee returned; and they had before them, in the book of the proceedings of the trustees, a sufficient ground for making the recommendation in his absence; viz. in 1758. But where was the absent trustee in the present case? He was not abroad; they might have wrote to him; a letter signed by him would have been sufficient. Therefore his Honor could not say, they might on that account delay more than a reasonable time. His Honor could not help thinking, the reason of their meeting in December was, that they heard the Chancellor had issued a fiat for the presentation. Then they said, that finding a person was presented, it would be in vain to recommend: that was not the fact, for he was not instituted or inducted, but the fiat only had issued, and no nomination was afterwards made by them. The question was, Whether his Honor would violate the intention, if he declared the present vicar entitled to the benefits intended for the vicars of P.? It was competent to the trustees even in December to have represented to the chancellor the reason of the delay, and to have recommended some other person; and if they had then recommended a person his lordship approved, he might have revoked the fiat, though it cannot be contended but that the lord chancellor might have rejected the person recommended if he thought fit. The relator's institution did not take place till the 17th of January. The trustees did nothing on their part. Now they contend that the relator was not entitled to this benefit. As to the doctrine of Cy

* The entry of the recommendation in 1758 is in these words: "All the trustees except C. T. being out of the country, do certify, that we approve," &c.

Vide Attorney-General v. Whitchurch, 3 Ves. jun. 141—146.

Vide Attorney-General v. Andrew, 3 Ves. jun. 633. where all the cases upon the doctrine of *Cy pres* are cited.

* 1 Bro. Ch. Ca. 444. (n.)

† Then Sir Lloyd Kenyon, M. R.

pres, as applied to charities, this sensible distinction has prevailed, that the court will not decree execution of a trust of a charity in a manner different from that intended, except so far as they see, that the intention cannot be executed literally; but another mode may be adopted consistent with the donor's general intention, so as to execute it, though not in mode yet in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated, if it can be attained. In *Attorney-General v. Bishop of Oxford** the purpose was to build a church in the parish of A., and the parish would not let the church be built. Lord Kenyon† very properly said, it could not be built any where else, and the intention must totally fail. So Mr. Justice Buller's opinion in *Attorney-General v. Bailey*, though there may be some doubt about it in that case, went upon that ground. But the court has said, where the general intention may be executed, it shall. In a case before his Honor (*Brantbam v. East Burgold*) the testator directed bread to be distributed to poor persons attending divine service and chaunting his version of the psalms. They could not be chaunted, because not authorized; but his Honor thought the testator's general object was to give the poor people the bread, and the chaunting the psalms was only accessory, because he considered his version as good as any other. Apply these principles to the present case. Sir F. N. had two objects: the first was a general charitable object, and very proper; an anxious desire to provide what he specified in his declaration, and what he thought a competent maintenance for the vicar. There was also another object; and the question was, Whether that was equally important, and was annexed to the first, so that they must stand and fall together? It was to secure to himself or his trustees the recommendation or approbation at least of the person nominated. If both these purposes could be effected, they ought; but did he mean the first object to fail, if from the obstinacy or neglect of his trustees the second could not take effect? That was not argued. Then there may be a case in which the maintenance may be applied to the vicar, though he had not received that approbation, as where it had been prevented by the neglect of the trustees. The trustees in this case have not done all they ought. His Honor did not believe they intended to defeat the testator's bounty; but they had

had

had it in contemplation to make their recommendation when it suited *their* convenience. That was negligence, though his Honor did not impute to them any thing criminal. It was said for the defendants, the crown ought to have waited six months. That would be to convert them into patrons. The trustees had only the nomination to the great seal, and must give the chancellor notice; for the chancellor is responsible for the person presented. The six months are with respect to a real patron. He loses his presentment, if he does not present six months after the death, not after the notice. Here it is plain the trustees had notice of the death, for one of them went to the chancellor upon it. The chancellor waited two months; and the trustees permitted the presentation to be followed by institution; the person giving up his other prospects in life, and coming into that parish. It would be extraordinary if this should disappoint the material object, and this person should not have the benefits intended for the vicar. Under the circumstances his Honor said, this court consider him entitled, though the condition was not complied with. The trustees had not been sufficiently diligent in the execution of their trust. His Honor wished to find a case like the present. He by accident met with two, from which something might be collected as to the rules governing this court in the disposition of charities, so as to overlook small circumstances, where they can, to promote the general intention. It seemed to his Honor that *Attorney-General v. Rigby*, 3 P. Wms. 145. and *Attorney-General v. Leigh*, T. 1721, subjoined in a note by the reporter, may possibly bear upon it. As to the first, what is there stated cannot be quite collected from the register's book, therefore his Honor supposed it fell from the chancellor in giving judgment. The other case is more material, as it is stated in the register's book, than in the report. The testator gave 100 l. and the rectory of B. to J., C., A., and the heirs of J., on condition that they should erect seven houses and lease them to seven poor men, such as they should think fit, and give the profits to them after defraying the expences; and in case of default in the performance of the trust for three months after the same ought to have been performed, which his Honor supposed meant the

building the houses, &c. the same for ever after to go to the minister and churchwardens of *B.* His Honor apprehended he meant, that then the trust should devolve upon them. Then a commission of charitable uses issued. It was observable, that under such commission they thought they might add to, or prescribe the mode of executing the intention. The commissioners decreed that *J.* should erect the houses, and before *Christmas* then next, place therein seven poor men or women of the parish of *B.*, which was not required by the original; and so upon death or removal the vacancies were to be filled up by other poor men or women of the parish of *B.* within six months after they should become vacant, and 3 *l.* to be paid to each of them. Afterwards upon an information the heir insisted, that he had a right to nominate any poor persons without regard to the parish of *B.*; but the court confirmed the decree of the commissioners, and decreed, that the heir within two months after notice of a vacancy should nominate out of the parish, and for default it should devolve to the parish. He had nominated two persons not of the parish; and yet those two persons nominated in an irregular manner, according to the decree, were permitted to enjoy as long as they lived. Hence it appeared the court would not permit the general intention to fail for want of circumstances annexed, which by the default or neglect of the parties could not take effect. Therefore this relator is entitled to the benefits intended for the vicars of *P.*; not upon the idea that if the trustees had recommended in proper time, and that recommendation had not succeeded, that then he would have been entitled; but upon this, that the general object was, that there should be a good minister, and there was a secondary intention that he should come in with the approbation of the trustees. His Honor questioned whether under these circumstances he did not answer the donor's intention better by giving this benefit to the vicar, though from the unfortunate neglect of the trustees he came in without their recommendation; but his Honor said that their neglect should not defeat the general intention. As to the costs, his Honor could not think of saddling the trustees, who were left to judge for themselves, and had no particular mode pointed out. He should have thought it better

better

better for them. to have kept to the precedent in their book. He inclined to pursue the mode adopted in *Attorney-General v. Rigby*. As to the relator's costs, he would have all the rest, paying the trustees their costs. The direction was not literally complied with. It was said the trustees ought not to have made any opposition. His Honor did not think they had made any. They had not disposed of the fund, or applied it to any other object; but they stated, that they were willing to act as the court should direct; and the will being positive, they did not venture to apply it to this vicar. Therefore his Honor declared, that the relator was entitled to the house intended for the habitation of the minister, the tithes, &c. and directed an account of the rents and profits. His Honor doubted whether he should lay down any rule; but probably the same circumstances might never happen again.

25. T. C. devised four tenements in S. to the churchwardens and vestrymen of the said parish as follows, viz. "In trust for them to give to such poor men of the parish as they shall think fit; if any of the descendants of John Jennerway, formerly of the said parish, apply, I desire that they may be preferred to have it; and as I intend these four houses to be in the manner and custom of alms-houses for men and their wives, I give and bequeath to the churchwardens and vestrymen of the parish of S. 2000*l.* in the four per cent. government securities, in special trust for them to dispose of the interest in the following manner, that is to say, my will is for them to give or allow to each of the four persons that they allow or permit to inhabit the said four houses in S. the sum of 13*l.* per annum, or 5*s.* per week, to be paid weekly, monthly, or at their discretion, that is, for a man and his wife; and if one of them die, the single one to have 3*s.* 6*d.* per week, and not permitted to bring in a second husband or wife." Testator gave the remainder of the said interest to other charitable uses, to which there was no objection. He appointed executors, but made no disposition of the residuum. Testator afterwards placed in the four tenements four of his own relations of the name of Jennerway, and on 27th Dec. 1792 by deed conveyed the said four tenements to trustees, to hold

6 June 1796, cor. M. R.
Attorney-General v. Whitbread,
3 Ves. jun. 141 to 146.

to them and their heirs to such charitable purposes as aforesaid, particularly directing that the said four tenements should at all times for ever after be held and used as alms-houses (in manner before mentioned), but upon all occasions the descendants of *John Jenneway* to be preferred. This deed was enrolled on 10th Jan. 1793. On 29th Sept. 1793 testator died. The present information was filed at the relation of the churchwardens and vestrymen of S., and a bill was filed by two of the alms-people placed in the houses by the testator, praying an account of the personal estate, that the bequest of the 2000*l.* stock might be established, and the fund transferred to the relators, to be appropriated according to the intention of the testator, or as near thereto as the circumstances might admit, or otherwise, that it might be declared to what extent the bequest was good. The plaintiffs charged that if so much of the bequest of 2000*l.* as related to the persons to be inhabitants of the said four tenements was void, yet the plaintiffs were entitled to the benefit of it for their lives as a personal bounty to them. *Per M. R.*—It was contended that though it must be admitted that the gift of the four tenements is void by the statute of mortmain, yet the other part, so far as it concerns the 2000*l.* stock, appropriated for the maintenance of the poor men and women, may be supported, as not being essentially connected with it, but as denoting a general intention, which, though the rest fails, may remain and be fulfilled. With regard to the principles upon which this court has administered charities where the same cannot be carried literally into effect, his Honor referred and adhered to the principles which he had laid down as a rule in *Attorney-General v. Boulbee* (a). A charity bequest cannot be defeated by the negligence or default of the person to administer it, or by the impossibility to give effect to every circumstance. If the general intention appears consistent with the rules of law and not against the mortmain act, it shall be carried into effect, without regard to the secondary objects which the testator might have intended. The doctrine of *cy pres*, which has been so much discussed, and which means the rule to execute the charitable intention as nearly as possible, is by late decisions, and particularly since the statute administered in this way, however wildly and extravagantly it may have been acted upon

(a) 2 Vef. jun. 380.

upon in former cases. The court will not administer a charity in a different manner from that pointed out, unless they see that though it cannot be literally executed, another mode may be adopted by which it may be carried into effect in substance without infringing upon the rules of law. If the mode becomes impossible, the general object, if attainable, must not be defeated. His Honor paid great respect to the decisions of Lord Hardwicke, in whose time the statute was made, and he agreed also with Lord Northampton in *Attorney-General v. Tyndall* (b), that the court is not to study to evade the statute. At the same time his Honor admitted that the authority of *Attorney-General v. Bowles* (c) has been shaken by subsequent authorities, and that it was not one of those decisions of Lord Hardwicke in which his Honor could entirely concur. His Honor meant that part of it where, admitting that the object was to erect a building upon land not then given, Lord H. threw out, that if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it. That is giving land in mortmain; for it is another mode of purchase, and holding out a temptation to people to give land. The doctrine, therefore, established by Lord H. and not shaken, is this, that where the testator has pointed out two modes, one consistent with the statute and the other not, the court will adopt and carry into effect that which is legal; but in all these cases it is necessary to see whether the testator has given such an option, and whether there is an ultimate object consistent with the statute or not. It remains to apply these principles to the present case, and see whether there is any intention to give the fund to the general purpose of providing for poor men and women independent of the alms-houses, or whether an endowment only is proposed by the appropriation of part of the interest to that. In that view it must fail. *Attorney-General v. Goulding* (d) is almost precisely in point, though his Honor had once thought it a more rigid construction of the rules of equity upon charitable bequests than in prior cases had been adopted. His Honor now agreed with that case, though not with what Mr. Justice Buller is stated to have said, that the rule of the court to execute the charitable purpose in

(b) Ambl. 614.

(c) 3 Atk. 306. 2 Vef. 547.

(d) 2 Bro. Ch. Ca. 428.

another way had been varied. His Honor perfectly agreed with the rule laid down, and denied that it had been varied; nor was it necessary that it should be so to support that decision. His Honor thought it extremely material that the principles of the cases upon charities should be fixed and determined; and therefore he was very desirous that the principles upon which he decided the present case, and concurred in *Attorney-General v. Goulding*, should be known. It was said an intention to give this provision to any poor men and women may be collected, but his Honor could not collect such an intention, else he would so execute it; it is not enough to say it is not inconsistent with that intention, or that, if the testator could have foreseen the failure of his object, he would have given it to poor men and women, without regard to the houses. His Honor could not infer from the will that he would, nor could he judicially pronounce such to be the intention of the testator. An endowment with a restriction as to another wife or husband, and where the conduct of the parties is under the controul of the trustees, is very different from a charity for poor and women generally. His Honor said he could not create another charitable object, or apply the present to any different object. The doctrine laid down in *Attorney-General v. Goulding* is fortified by Lord Thurlow in some case before him, and *Blandford v. Thackerell* (c) is an authority for that decision. It might have been argued there also, that if it could not take effect by a permanent establishment of a school, it might by paying a schoolmaster or mistress to teach poor children at large; therefore it might be established in that way, without regard to the particular direction; but the Lord Chancellor did not think himself warranted in collecting such an intention. Without shaking any rule laid down, except the part of *Attorney-General v. Bowles* before mentioned, his Honor declared, that under the true construction of the will the intention was to make an endowment of alms-houses; that there was no general intention beyond that; and therefore the bequest, so far as it concerned those alms-houses, must fail with the object to which it was attached.

(c) 2 Ves. jun. 238.

5 Mar. 1798, cor. Loughb. C.
Attorney-General v. Andrew,
Case of Trinity-Hall in Cambridge.
 3 Ves. jun. 633 to 651.

26. Dr. Andrew by will, dated 15 May 1747, gave all his 3 per cent. annuities to Trinity-Hall, and directed that the same should as soon as convenient

§ 6. *How far controlled in Equity—Doctrine of Cy pres. C—* a 119

venient be laid out in land and settled to the uses of certain of his relations for their lives, remainder to *Trinity-Hall*, and that such lands should be vested in the college which by licence of mortmain was enabled to take, and he directed that four new scholarships should be founded; the scholars to be elected from *Merchant-Taylors' School*, who should receive quarterly from the Burfar 5 *l.* over and above the usual allowance to the scholars of that house. Testator then directed the remainder of the rents and profits to be put out to interest until 20,000 *l.* should be thereby raised, to be laid out in additional buildings to the college, either upon the plan then made, or such other as the college should approve. Testator also directed that as soon as his stock should be invested in land the accounts were to be kept in the same manner as the *causeway* accounts, and that 5 *l.* should be paid to the master, 5 *l.* to the Burfar, and 20 *s.* to each fellow who should be present at the audit, and to the Burfar the further sum of 20 *l.* per ann. for keeping the said accounts. And after the said 20,000 *l.* should be raised for the building, testator directed that four new fellowships should be erected and added to the then present number, upon the same footing, subject to the same rules, and with the same privileges as other civil law fellowships, and to be chosen in the same manner, saving only that they must be from among the scholars at *Merchant-Taylors' School*; and when the said fellowships should be so added, then the said account to be discontinued, and the future rents and profits to be applied to the general use of the college, continuing to pay the Burfar 20 *l.* per ann. and paying also 10 *l.* per ann. to the law-lecturer in addition to his salary. Testator gave also to the college a turnpike bond for 1050 *l.*, subject to the life interest of his nephew therein; and the further sum of 100 *l.* and a specific legacy of plate. The residue of his personal estate testator gave to his sister and sole executrix. Testator died soon after the making his will, and in 1793 the last of his relations died to whom he had given an estate for life by his will. Whereupon the present information was filed by the master and wardens of *Merchant-Taylors' School* against the master, &c. of *Trinity-Hall* and *James Andrew*, who was heir at law to testator, and executor of the last surviving

tenant for life, praying that the college may be decreed to accept the trust, or if they were not bound to accept the trust, that the testator's bounty might be applied for the benefit of *Merchant-Taylor's School*, as the court should deem most nearly to correspond with the charitable designs of the testator. The college by their answer admit that they had done some acts in conjunction with the surviving relations of the testator to preserve the fund, and had permitted transfers to be made in their name; and they also admitted that they had declined to act in the trusts, and desired to renounce the bequests of the testator, as being prejudicial to their college and its establishment: they submitted also that the acts done by them were not done in performance of the trusts, and that they were not bound to an acceptance of them, of which in *December 1793* they gave the relators notice. The relators contended that the college had accepted the trust, for that the respective tenants for life received their dividends under the college, and since the death of the testator's nephew they received the interest of the turnpike bond themselves, and cited *Attorney-General v. Christ's Hospital* (a). Per Lord Chancellor—The college have done nothing to conclude themselves as an acceptance of the bequest; they had only put themselves in trust of the money to save testator's relations the expence of a suit. His lordship was not prepared to say, whether there could be any mode of executing this charity *cy pres*, or whether if there be no use to be executed, it must go to the representatives? Wherefore the cause was re-argued, and upon the rehearing relators produced a book of the college, containing a memorial of their acts, which they insisted upon to bind the college, and contended that wherever the doctrine of *cy pres* had been pressed the court had thought they must find in the will a general intention for charity predominant over the particular charity, and that in the present case the bequest to the college was very specific (b). For the next of kin it was contended, that the intention in this case was too precise. By applying the charity to another college the court would act contrary to it. The ground of the doctrine of *cy pres* must be that the court is satisfied they execute the intention as near as possible, and it was insisted that the testator

(a) 3 Bro. Ch. Ca. 165.

(b) For the relator were cited *Attorney-General v. Bishop of Oxon*, 1 Bro. Ch. Ca. App. 21. *Moggridge v. Thackwell*, 3 Bro. Ch. Ca. 517. 1 Ves. jun. 464. *Attorney-General v. Boulton*, 2 Ves. jun. 380. *Attorney-General v. Whitechurch*, 3 Ves. jun. 141.

36. How far controlled in Equity—Doctrine of *Cy pres*. C—2121

testator in the present case would have given his charity to another college if this gift had failed (c). Lord Chancellor thought he might modify the objection by permitting fewer persons than the testator proposed to be brought in, if not the testator must be taken to have meant the benefit of a college, and rather than the charity should fail his lordship would try if another college would not be trustee on the terms proposed. Lord Chancellor felt no difficulty in saying that the college were competent to accept, to refuse, or to suspend their decision. The first question was, if they had done any act to bind them to an acceptance of the trust? it was clear they once intended to accept it, from their official acts to preserve the fund, and they did every thing but the final act of investing themselves with the fund. His lordship took a view of the whole conduct of the college, but could not hold that they had made an absolute election to accept the trust, though they had undoubtedly accepted the administration of the property, for which they must be accountable, and they were ready to account: they could not be finally bound by the previous steps of their predecessors, which engaged them to nothing but to act honestly as trustees with regard to the fund. The second question his lordship thought not fit to decide upon till some proposal had been stated with regard to the charity. Some of the cases cited had gone the length to raise an idea that the doctrine of *cy pres*, as to a charity, ought never to be mentioned again in this court; but his lordship was not clear of that. The purpose of the testator was clearly out of the mortmain act, for it was a devise to a college. It does not fail from any imputation in the testator, for he was not devising any folly impracticable in itself. All could have been done had the college accepted the trust. The execution of testator's purpose for a charity directed to a course of education was frustrated by events contingent and independent of the purpose, as if the trustees, according to whose discretion a charity was to be adopted, had died. His lordship said it would be fit to see what sort of proposal could be stated. It would come near the purpose if *Trinity-Hall* would not admit the scholars as fellows, but would admit them as exhibitioners. His lordship did not know that it would wander very widely from the intention, if any other college were

(c) The doctrine of *cy pres*, as applied to charities, was formerly carried to a great length, as in *Baxter's case*, 2 Vern. 248. *De Costa v. De Pas*, Amb. 228.—These cases have been much shaken by latter cases. *Vide* *Attorney-General v. Bishop of Oxon.* ante. *Attorney-General v. Goulding*, 2 Bro. Ch. Ca. 428. which case, though doubted *per M. R.* in *Attorney-General v. Boulton*, was fully established by him upon a review of all the cases in *Attorney-General v. Whitchurch*.

were disposed to receive fellows so well endowed as these fellows might be. His lordship proposed to dismiss the information so far as it prayed that the college might be bound by the directions of the will with regard to the establishment of laying out money upon buildings, and providing for the addition of four scholars to be fellows, and to direct an account of the money received by the college, and further to direct the college to transfer the stocks and deposit the turnpike bond with the master, and the interest in arrear received by the college to be paid in. All parties to have their costs out of the estate, reserving farther considerations until after the Master should have made his report, directing him to receive any proposal *ex parte Merchant-Taylor's School*, for establishing a charity within the terms of the will.

If *Merchant-Taylor's School* could lay a proposal of an establishment with regard to the four scholars; such number of scholars as they should think the school would afford his lordship wished to have as a particular object for his consideration, whether that object was so near the intention that he could effect it?

The decree was drawn up accordingly (d).

(d) During the argument Lord Chancellor mentioned the case of *Attorney-General v. Baliol College*, cor. Northington, C. It arose upon a benefaction by Dr. Snell, for four students coming from Glasgow to Baliol College. The information stated great abuses by the College, who had the estate vested in them. They had made bad leases, and there was much reflection. A point was made to have the exhibitioners removed; a peevish answer was put in, and they said they would have nothing to do with the exhibitioners. Lord Northington gave them time to consider of it, and they repented; but not a doubt was entertained of transferring the exhibitions to another college.

17 Mar. 1708, cor. Loughb. C.
Attorney General v. Bowyer,
3 Ves. jun. 714 to 731.
Downing College Case.

Note: The cases of *Attorney-General v. Lady Downing*, Amb. 350 and 571. ante, pl. 14. are cases upon the same will.

27. In 1716, Sir George Downing conveyed his estate to trustees to prevent dower, and then married. On 20th December 1717 he made his will, and devised all his freehold estate to certain persons to the use of his cousin and heir at law for life, with remainders over; remainder to trustees and their heirs in trust, out of the rents and profits, to purchase a piece of ground in Cambridge proper to erect a college, with convenient appurtenances, which should be called *Downing College*, and to obtain a charter for incorporating the same to be maintained and governed as testator's trustees, with the consent of the archbishops of *Canterbury* and *York*, and the masters of *St. John's* and *Clare-Hall* should appoint; and after such foundation, the trustees and their heirs to hold in trust for the said collegiate body and their successors for ever; and

and testator gave his leaseholds on the same trusts. Testator gave his goods and chattels to his said cousin, and appointed him executor. By codicil testator charged some annuities on his lands. Testator died in 1749 without issue; his cousin entered and enjoyed the estates till 1764, when he died without issue. On his death his widow and executrix entered. In 1764 an information was filed against her and the heirs of testator's cousin (a), praying that testator's will might be established and the trusts thereof carried into execution, and that an account might be taken of the rents received by her, and that a receiver might be appointed. That cause was heard in 1769, when Lord Camden decreed the trusts of the charity to be carried into execution, in case the King should grant a charter. In 1769 the cause was further heard before Lord C., who declared the testator's will well proved, and that the trusts of the charity ought to be performed if the King should grant a charter and licence for the intended college to take in mortmain, subject to the obtaining of which charter and licence his lordship referred it to the Master to settle the form and endowment of the charity. In 1768 Lady D. married defendant. In 1773 she died, leaving J. W. residuary legatee and executor. In 1779 a bill of revivor was filed against J. W., praying an account of the rents and profits of the original testator's estate received by Lady D., and that the former decree might be carried into execution. In 1795, an order was made for a separate report upon the annual value of the premises devised. The Master reported (*int. alia*) that by reason of the intermixture of the testator's estates with those of the defendant, he could not certify the annual value of the estates devised to the charity. Five fruitless applications were made to the crown for a charter; and in 1797 the costs of such applications were ordered to be paid to the parties. The cause then came on for further directions, and (*int. al.*) it was prayed that defendants should lay a proposal before the Master for founding a college according to the will. Lord Chancellor said, that as the court had declared the testator's will well proved it ought to be carried into execution, and he should feel no difficulty in directing the Master to receive proposals. His lordship wished to consider the claims set up by

(a) *Vide* Ambl. 550.

by the representatives of Lady D., who was the representative of the testator to the intermediate rents and profits, from the death of the testator to such period of time when there should be an establishment of a college incorporated. That claim was not founded in any express terms of the former decree, nor are there any express terms in the decree to bar it. The point was not raised at the hearing. His lordship thought he must, notwithstanding the length of time, act as if that decree had been recent; his lordship could not reason if it was proper or not; it was to him a law, imperative and irreversible; he could only apply the decree. This led his lordship to consider whether the former decree had not disposed of the question, though not expressed in terms. It resembled those cases where a devise upon a future contingency was to take effect, and there was no intermediate disposition of the rents and profits, the court there held a resulting trust for the heir (b). What then would have been the argument if that point had been pressed on the court on behalf of Lady D. at the hearing. The legal right was perfectly established, that though the object of the devise be to some future establishment of a use good in itself, the intermediate rents and profits therefore are not capable of being taken by the heir at law standing in the place of his ancestor; but at law they are applicable to the use, if that is legal (c). Lord Chancellor then went into an examination of *Porter's* case and the case of *Sutton Hospital*, considering it material to ascertain upon what ground they stood, and how they affected the present case as at law. *Porter's* case was upon a devise before the statute of wills (d) and the statute of uses (e), and consequently before the statute of *Eliz.* (f), before which time the court of Chancery had no cognizance upon informations for the establishment of charities. In the case of *Sutton Hospital* it was held, that though the corporation was not in existence, the purpose being good, the heir of the founder had no interest. According to those cases, an appointment by will, if the purpose described is good, is a good use at law. If the trust is to be executed in equity, the court, by the power it has over trusts, ought to prevent the heir from claiming any right. The trust by the decree in this case is as emphatical a trust of the rents

(b) *Vide* *Hopkins v. Hopkins*,
Ca. temp. Talb. 44. 1 Atk.
597. *Carrick v. Errington*,
2 Wms. 361.

(c) *Vide* *Porter's* case, 7 Co. 16.
Case of *Sutton Hospital*, 10 Co. 1.
by which this is distinctly proved.

(d) 32 H. 8. c. 1. 34 H. 8.
c. 5.

(e) 27 H. 8. c. 10.

(f) 43 Eliz. c. 4.

rents and profits of the land for the purpose, as soon as may be, of purchasing the ground and building upon it; and part of the trust, which the court has declared good, was to obtain a charter and licence. The case would have been the same, supposing the devise had been to an existing college which had exhausted its licence to hold in mortmain; for until that licence was obtained, the college, having no power to hold in mortmain, could not have taken any legal interest in the land. His lordship said it could hardly be imagined that the rents and profits accruing between the death of the testator and the time the right to hold in mortmain was *de facto* granted by the crown, would go to the heir. His lordship did not wonder that no direction was given at that time for an account, or for the appointment of a receiver. Considering by whom the decree was made, it would be indecent to suppose that a defect was left in the decree on purpose to defeat what the court thought themselves bound to establish. Lord Camden in the judgment he gave (g) stated that *ex debito justitiæ* he was obliged to act, and that the court could not be passive; no reluctance was shewn by him in making the decree, but it was frank and decisive. As to what was thrown out, that there were colleges enough in Cambridge (h), the court said the contrary. The court said there was nothing in the testator's devise that should prevent the execution of the particular purpose, if consistent with his majesty's pleasure that it should take effect. The decree has declared that the trusts of the will ought to be performed and carried into execution; then the specific trust for creating a college was suspended until the crown should grant a charter; the language of the decree shews the present is a good devise to a charity, and that the right of the heir is totally gone. The decree has not said that the particular trust failing, the will was void. The King may appoint it to another purpose (i). Lord Chancellor felt himself bound to say that the rents and profits of the testator's estates did not belong to the persons who possessed them, and that therefore he was bound to take care of them. The present being the case of a charity, his lordship could not give that benefit to the defendant which he might have done in other cases, as from length of time, &c. The court, in many instances, has

(g) Lord Chancellor here read his own note of Lord Camden's judgment.

(h) It was said in argument that a new college is not within the proviso of the act, and that Lord Northington had said the legislature intended to throw nothing in the way of devises to the universities, or to colleges already established there, meaning that there should be no new establishment, but that the colleges already there should be better endowed. Lord Loughborough expressed his doubts of that distinction.

(i) As to the doctrine of *cypres* with respect to charities, vide *Attorney-General v. Andrews*, 3 Ves. jun. 633. and the cases there referred to.

been

(k) Lord Chancellor, during the argument, intimated that the account ought to be with interest and costs.

been obliged to follow the testator's assets at the great inconvenience and hardship of the parties, as upon the singular will of Mr. *Travers*, where his lordship said he was obliged to make a harsh decree upon those who had held the assets for a long time, though he wished he could find a shorter and more limited period from which to date the account (l). Lord Chancellor directed that the trustees should be at liberty to lay a plan before the Master for founding and establishing a college according to the directions of the testator's will, and that the Master should report upon that. All parties to have their subsequent costs.

SEC. 7. What shall be construed a Mis-employment of Lands, Goods, or other Effects, appointed to Charitable Uses; what Remedies may be had in such Cases; and where the Appointees, Trustees, or Governors are punishable for Corruption or Neglect.

H. 1700, cor. Wright, C. S.
Lydiatt & al. ex parte Felfed Hospital v. Sir John Feach,
2 Vern. 411, 412.

1. **L**ORD *Rich*, who founded *Felfed Hospital*, among other rules directed that no lease should be made for a longer term than twenty-one years, and that at the old rent, taking a fine only of two years value. In 1640 the hospital granted a lease at the old rent (of 18 *l. per ann.*), but took a deed of covenants from the lessee to pay an additional rent of 32 *l.* In 1659 the hospital made a lease to *J. A.* for twenty-one years, reserving the old rent of 18 *l.*, and by deed of covenants the lessee contracted to pay 32 *l.* additional rent, and the hospital covenanted to renew from time to time, to make up the term sixty years, and in 1679 they made a new lease accordingly. In 1682 the lease was renewed again, and an indorsement was made on the deed of covenants in 1659 confirming the former agreement. Defendant, who had purchased of *J. A.* brought a bill to have his lease renewed pursuant to the covenant in 1659, which was dismissed, the covenant for renewal being as much to the prejudice of the hospital as the granting of a lease for 60 years in the first instance, which was contrary to the intention of the founder.

Defendant

Defendant being thus deprived of the benefit of his renewal, refused to pay his additional rent. Lord Keeper thought it a fraud on the hospital that the covenant to pay the additional rent was indorsed on the deed of covenants of 1659, and not on the counterpart of the lease in 1682, and therefore decreed that on payment of the additional rent of 32 *l. per ann.* defendant and his assigns should enjoy during the residue of the term of twenty-one years under the lease of 1682; but his lordship said he could not decree a renewal of the lease without decreeing the corporation guilty of a breach of trust, though it was an indenture of mutual covenants.

2. A public company being trustees for a charity mismanage the fund, and neglect the objects of it. Held, that they should make good the deficiency out of their own estate, and pay costs of the suit.

21 Jan. 1701, Dom. Proc.
Haberdashers' Company v. Attorney-General ex parte Newland Hospital, 1 Bro. Pl. 9.

3. In the 5 *Edw. 6.* the parish of *Saint Clement Danes* purchased lands worth 8 *l. per ann.* in *High Holborn* in trust for charitable uses. Afterwards, by building, &c. the lands in question increased in value to 450 *l. per ann.*, which was employed in augmentation of the charity. In 1682 the trustees, by order of the vestry, charged these lands with an annuity of 100 *l.* to raise 1000 *l.* for the use of the parish. The parishioners afterwards brought a bill to set aside this annuity, as being granted in breach of the charity (the commissioners of charitable uses having already so decreed). But Lord Keeper dismissed the bill, and would have made the parishioners pay the costs, had they not submitted to pay the arrears and growing payments of the annuity.

M. 1701, cor. Wright, C. S.
Attorney-General v. Lady Hart
3 *al. Proc. in Cb.* 225.
2 *Eq. Abr.* 198. pl. 1. 750. pl. 1.

4. A corporation are trustees for a charity, and in possession of the charity estate, but suppress or conceal some part of the evidence relating to the charity, they shall pay the cost of the suit.

10 June 1713, Dom. Proc.
Hertford Borough v. Hertford Poor, 1 Bro. P. C. 329.

5. Sir Thomas White in 34 *H. 8.* intending to prefer the commonwealth of the city of *Coventry*, then in great decay, paid to the mayor, &c. 1400 *l.* wherewith they purchased land of the value of 70 *l. per ann.* On 6 July, 5 *Ed. 6.* they covenanted with the *Merchant-Tailors' Company* in *London*, that immediately after Sir T. W.'s death they would yearly pay the profits of these lands as follows,
viz.

11 Mar. 1720, Dom. Proc.
Coventry City v. Attorney-General and others, Case of Sir Thomas White's Charity, 2 *Vern.* 397.
4 *Vin. Abr.* 496. pl. 16. 2 *Eq. Abr.* 198. pl. 3. *Colles' P. C.* 280.
2 Bro. P. C. 236.

viz. 24*l.* per ann. in free alms for ever to twelve poor inhabitants of Coventry, 40*l.* per ann. in free loan to young freemen of Coventry of good name, &c. to be lent out for nine years, and then to be called in and put out again in like manner for ever; and the other 6*l.* to be paid yearly, 20*s.* to the Merchant-Tailors, 6*s.* 8*d.* a-piece to the mayor, recorder, and ten aldermen of Coventry to see the charity performed, and 20*s.* to the town clerk for making the entries. This to continue in Coventry for forty-one years, and afterwards the 40*l.* to circulate yearly between Coventry, Northampton, Leicester, Nottingham, and Warwick for ever.

This 70*l.* per ann. continued to be so disposed of for one hundred and fifty years; but the aldermen of Coventry differing about sharing the surplus of the charity estate, the other four towns by this accident became informed that the estate was greatly increased in value. Whereupon in Hilary term 1695 an information was filed by the Merchant-Tailors' Company on behalf of the said four towns against the corporation of Coventry, for an account and distribution of the surplus profits in augmentation of the charities.

On 13 December 1700 this cause was heard before Wright, C. S. and his assistants (a), when it was decreed that the corporation of Coventry were entitled to the surplus rents of the lands, and the information was dismissed.

But on appeal to the House of Peers (b) their lordships, on 19 February 1702, reversed the decree of dismissal, and ordered that the court of Chancery should give the plaintiffs such relief on the information as should be just. The house declaring their opinion to be that the increase of the value of the lands in question ought to be applied towards the augmentation of the several charities and appointments.

In consequence the court of Chancery on 12th June 1703 decreed the full value of the estate to be applied according to the order of the House of Peers; and upon a reference from that court to the Master, and upon a hearing for further directions upon the Master's report, it was decreed that the corporation should account for what they had received out of the charity lands from the time of the order made by the House of Peers; and as they appeared to have misbehaved themselves, they were to have no costs from the time of that order, and a receiver was appointed, and the corporation were enjoined

(a) *Vide* 2 Vern. 397.

(b) *Vide* Colles' P. C. 280.

enjoined from receiving any of the future profits of the estate. But pending these proceedings, the corporation of *Coventry*, by fraud and undue practice, drew the other four corporations into a private agreement, whereby, under a pretence of costs, though none were decreed or reserved, they agreed to pay the four corporations and the *Merchant Taylors' Company* 825 *l.*, and instead of applying the full increased profits of the estates (which were reported to be 2241 *l.*) in augmentation of the charity, they agreed to pay out of it only 60 *l. per annum* to the corporation of *Coventry* and the other corporations. And in order to execute this agreement, the defendants demised all the charity-lands to the *Merchant Taylors' Company* and the other four corporations for *twenty thousand and one years*, and accepted a re-demise thereof for twenty thousand years, under the particular rent of 60 *l. per annum* to the four other corporations, which was much less than their proportion of the charity. Upon the discovery of this transaction, and that the defendants had made contracts for leases for long terms on large fines, at small reserved rents, to their own members' sons and friends, the court of Chancery recommended it to the Attorney-General to bring another information on behalf of the inhabitants as *paupers*, against the five corporations, and such as had signed the agreement, in order to enforce the former decree.

Accordingly in *M. 1709* a second information was filed to have the agreement set aside and the trust estate transferred to new trustees.

Upon the hearing of this cause before *Harcourt*, C. S. on 27 *February 1710*, he declared the agreement to be vile and corrupt, and entered into with intent to defeat the order of the House of Peers. His lordship decreed, therefore, that the said agreement and the deeds of demise and re-demise should be set aside, and that the trust-estate should be re-assigned so as to put the defendants and the other corporations in *statu quo*. And the former cause coming on at the same time on the Master's report, defendants were ordered to bring the 2241 *l.* before the Master in *three months*, and in the mean time the consideration of settling the trusts was suspended.

After the expiration of *five months* the court enlarged the time for *three months* longer; but

VOL. II.

K

declared,

declared, that if the defendants did not bring in the money by that time, the trusts should be transferred, as well on account of their disability as misbehaviour.

Defendants repeatedly applied for further time for payment of the money; but the court thought proper to direct the Master to approve of new trustees, which being done, the corporation of *Coventry* were directed to convey and assign to such new trustees according to the former trusts.

Pursuant to this decree the trust estate was assigned; but defendants neglecting to pay the money reported due, a sequestration issued against them, and after lying under that sequestration for seven years, they raised money enough to satisfy the demand, and then (but not before) they appealed from the decree. But the Lords, after hearing counsel on this appeal (on both sides), affirmed the decree, yet without prejudice to the appellants applying to the court of Chancery according to the course of that court for a conveyance of the trust estate, as that court should think just*.

* *Note*; It appeared that this noble charity was so greatly increased, that instead of the 24 l. *per ann.* to the poor inhabitants of *Coventry*, they received at this time (1720) above 300 l. *per ann.*; and instead of the 40 l. *per ann.* loan-money, paid to the five corporations successively, they received in their turn near 500 l.; and that the other charities were augmented in proportion.

M. 1720, cor. Parker, C.
Taylor v. Dulwich-Hospital,
1 P. Wms. 655.
2 Eq. Abr. 198. pl. 2.

6. A college seised in fee was restrained by the statutes relating to its constitution from making any leases except for twenty-one years, and at the rack rent. The college made a lease to *A.*, who having much improved the premises, by building, &c. an entry was made thereof in the audit book, and a recommendation signed by the master, warden, and most of the fellows, to grant *A.* a new lease at the expiration of the old lease, at the same rent, and under the same covenants; and when the term was near expiring, an order was made at another audit for such new lease. The present bill was brought by *B.*, *A.*'s administratrix, to compel the college to make a new lease, and the master warden was *B.*'s principal witness. *Per Parker, C.*—The master warden, who appears as a witness, has betrayed his trust in relation to the college, and has acted inconsistently with the oath he has taken as warden. His lordship also disapproved of the recommendation to grant a new lease at the old rent, it being to wrong the college and break the statutes.

Statutes. The signing a contract for leasing by private persons, viz. the master and fellows, was not binding to the college, it not being under the college seal (a). There would have been some equity if the intestate had, after his order for a new lease, laid out money in improvement, in confidence and reliance on such order; but even in that case he should have had his reparation only from the private persons signing such order, and not from the college; and as to repairs done by the lessee since the said order, they are no more than what by his old lease he was obliged to do. Bill dismissed with costs.

(a) A contract to bind any corporation as to its revenue, must be under its common seal.

7. Upon exceptions to a decree of the commissioners of charitable uses, where the governors of *St. Olave's free-school in Southwark* had joined in making a long lease for years of six houses at 5*l.* per annum rent, which were worth 50*l.* per annum. The *Lords Commissioners* decreed the assignee of this lease to surrender it, and ordered the lessee and the governors to pay 70*l.* costs. Lord *King* now affirmed the decree as to the surrender, but mitigated the costs to 50*l.*, saying there was no reason that the charity should pay the costs; on the other hand, it was just that the owner of the lease, who was to have the benefit of the breach of trust, should pay costs; and as to the governors, though they were to gain nothing by this, and were not guilty of any corruption, yet they had been extremely negligent in their trust, for which they ought to be punished with some costs.

T. 1725, cor. King, C.
East v. Ryal, 2 P. Wms. 284.
2 Eq. Abr. 199. 1 L. 6.

8. A trustee of a term for a charity purchases the reversion in fee; he shall not cut down timber without making satisfaction to the charity.

M. 1726, cor. King, C.
Boys v. Bird, 2 P. Wms. 398.
2 Eq. Abr. 746. pl. 5.
Vide Bewick v. Whitfield,
3 P. Wms. 267.

9. Trustees of copyholds in trust for repairing the church of *A.* and chapel of *B.* in that parish, by desire of the parishioners bought new ground, and built a new chapel, the old one being too small, and in ruins. This was held not a deviation from the trust; and the trustees were allowed to apply the rents and savings, but not to mortgage or charge the rents and profits of the estate by anticipation. If the savings are not sufficient to reimburse the trustees, they are entitled to reimbursement by the parish.

H. 1793, in Scacc.
Attorney-General v. Foyster & al.
1 Asstr. 116.

Vide Attorney-General v. Harrow School, 2 Ves. 551.
Attorney-General v. Smart,
1 Ves. 72.

H. 1793, cor. Lds. Comrs.
Attorney-General v. Foundling Hospital, 2 Ves. jun. 42.
See this case more fully, ante, f. 1. pl. 12.

Vide Attorney-General v. Smart,
1 Ves. 72.
Attorney-General v. Middleton,
2 Ves. 327.

14 July 1794, cor. M. R.
Attorney-General v. Boulton,
Case of Poleworth Vicarage,
2 Ves. jun. 380—391.
See this case more fully stated,
ante, f. 6, pl. 24.

An information for a charity will not be dismissed, if there appear any directions proper to be given, although the prayer be wholly mistaken.

10. The general controlling power of the court over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust; which will not be presumed, but must be apparent or made out by evidence. The *Foundling Hospital* is an institution of this kind; therefore on motion for an injunction to restrain the governors from building round it, the same was refused, a breach of trust or a probability of it not being made out; and held, it is not in the nature of waste to turn meadow into buildings, unless clearly injurious.

11. Sir F. N., in 1653, conveyed the vicarage-house of P. and sundry other benefits to trustees in trust to permit the vicar to dwell therein, and enjoy the benefits, provided he be there *settled* at the nomination of the trustees for the time being. It appeared by the case that the vicarage of P. was in the gift of the crown, and that the Chancellor from time to time since 1653 presented upon the nomination and recommendation of the trustees, though only two instances of such recommendation appeared in proof, one in 1747 and another in 1758. In 1787 the then incumbent died, whereupon one of the trustees called on the Lord Chancellor; but not seeing him, left a letter, requesting his lordship would wait a short time for the recommendation of a successor by the trustees. Lord Chancellor waited two months; when no person being nominated, his lordship issued his *fiat* for presenting the relator. Some time after, the trustees met; and finding the Chancellor's *fiat* issued, they took no farther steps to assert their right, though the relator was not instituted till a month after their meeting. Upon the relator's taking possession of his vicarage, he applied to the trustees to have the enjoyment of the benefits attached to it by Sir F. N. in 1653, which they refused; whereupon he filed the present information. The trustees contended, that the relator could claim no part of the donor's bounty except the vicarage-house, as he was not of their nomination, and that the Great Seal was bound to wait six months for

for their recommendation. They further stated, that they were preparing to apply the trust fund to other charitable purposes, under the direction of the court; and as a reason for their not having recommended immediately, the absence of one of the trustees was alledged. It appeared in proof that on former occasions the trustees had recommended on the very day of the late incumbent's burial, and did not admit of greater delay; and that upon the presentation in 1758 one of the trustees was then absent, notwithstanding which they in like manner nominated immediately. M. R. did not impute any thing criminal to the present trustees, but thought them guilty of neglect, and that the Great Seal was not bound to suspend the presentation until it suited their convenience to recommend; neither ought the general intention of the donor to fail by reason of the misconduct of his trustees. Decreed to the relator all the benefits attached by Sir F. N. to the vicarage of P.; but his Honor would not saddle the trustees with the costs, because they were left to judge for themselves, and had no particular mode pointed out to them. His Honor did not consider them as having made any opposition, neither had they disposed of the funds, or applied it to any other object; on the contrary, they were willing to do as the court should direct; and as the will was positive, the trustees did not venture to apply it to the vicar. His Honor directed an account of the rents and profits; and that as the relator would take all the rest, he should pay the trustees their costs.

SEC. 8. To whom the surplus Rents of Lands devised to a Charity, or the Increase of Funds appropriated to charitable Purposes, shall belong, and by whom they are payable.

1. *A.* Being seised in fee of a manor of the annual value of 240 *l.* did, (by his will,) among other legacies, give to his heir at law 40 *s.* to be paid out of his personal estate, and then proceeded in these words: "Being determined to settle for the future, after the death of me and my wife, the manor of *F.* with all the lands, woods, and

19 May 1698, Dom. Proc.
Upon an appeal from a decree in Chancery.

Arnold v. Attorney-General and others, Show. P. C. 22.

1 *Eg. Abr.* 98. pl. 3. S. C.
2 Vern. 397.

" appurtenances to charitable uses, I devise
 " my manor of *F.* with the appurtenances
 " unto *L. J., &c.* and their heirs and assigns
 " for ever, upon trust that they or their assigns,
 " after the death of me and my wife, should
 " pay and deliver yearly for ever several par-
 " ticular sums to charitable uses therein men-
 " tioned, amounting in the whole to 120*l.* *per*
 " *ann.*," and made no farther charge upon the said
 manor, (except the expences of the trustees in the
 execution of the said trust). *A.* and his wife soon
 after died. The Attorney-General brought a bill
 against the appellant as heir at law, to establish
 the said charities, and to enforce the trustees to
 transfer their trust estate. The appellant by his
 answer claimed as heir at law the surplus of the
 charity estate, after satisfying the yearly payments
 expressed by the will and the charges of the trust.
 Upon its being referred to the Master to ascertain
 the yearly value of the manor he reports it worth
 240*l.* *per ann.* at the time the testator made his
 will. The court of Chancery declared that all the
 profits of the premises ought to be applied to the
 charities in the will mentioned, and that the
 appellant was not entitled to the surplus, and
 directed how the surplus should go in augmentation
 of the charities; but in case the appellant should
 seal and execute a release and conveyance of the
 premises to the trustees, according to the decree,
 then the appellant to have his costs out of the sale
 of timber, and that the trustees should be indem-
 nified.

Decree affirmed by the Lords accordingly.

M. 1700, cor. Wright, C. S.
Holt, C. J. Powell, J. and Blen-
 coc, J.

Attorney-General v. Mayor of
Coventry, 2 *Vern.* 397.

See this case fully stated, ante,
 § 7. from 2 Bro. P. C. 236.

2. The reversion in fee of divers lands let on
 leases, on which in all 70*l.* *per ann.* rent was
 reserved, was granted by King *H. 8.* to the
 corporation of *Coventry*; 400*l.* of the purchase
 money was paid by the corporation, and 1000*l.*
 by Sir *Thomas White*; but in the grant the corpo-
 ration was said to be the purchasers, and it was
 by the deed declared that the whole 70*l.* *per ann.*
 should be applied to the several charities therein
 mentioned. The lease expiring, the value of the
 lands was greatly improved, but the surplus had
 all along been received by the corporation of
Coventry. The lands themselves not being given
 to the charities, but particular rents out of the
 lands, decreed the corporation should have the

surplus

§8. Of Surplus Rents and Increased Funds.

C—a 235

surplus of the profits. But this decree was reversed by the Lords*.

* *Vide* S.C. 4 Vin. Abr. 496. pl. 16. 2 Eq. Abr. 198. pl. 3. Colles' P.C. 280. and 2 Bro. P. C. 236. where it was resolved that the city of Coventry, having grossly misbehaved themselves in the execution of their trust, were utterly removed.

3. The owner of land charged with an annuity for the maintenance of a schoolmaster, will not be excused from the payment thereof on account of there having been no schoolmaster for six years. Though there are not persons in a parish sufficient to answer the description of a charity, yet the land charged with the payment of an annuity is not discharged; but the same shall accumulate for the advancement and increase of the charity.

26 Jan. 1741, cor. Hardw. C.
Aylet v. Dodd, 2 Atk. 238.

4. This charity seems to have been founded by act of parliament regn. Ed. 6.; but the nature of the endowment does not appear. The substance of the information is not stated; but it seems an account was directed; for in speaking of the account Lord H. said—

13 July 1744, cor. Hardw. C.
Attorney-General v. Price,
Case of Berkhamstead School,
3 Atk. 109.

"The poor are entitled to the surplus after the master and ushers' stipends are paid. There are twelve leases expired, and if not let, I must presume the master and usher have received the rents ever since their being made a corporation for that purpose." Lord H. further said—"As to letting leases for the future, one consideration is, whether I shall let for the improved rent, or direct fines to be taken; and I shall have a regard to the poor, and to prevent the rich from taking it to themselves, I will order the surplus to be paid to such poor as are not maintained by the parish."

Referred to the Master to enquire whether it was most for the benefit of the charity to let leases at the improved rents or upon fines.

5. An information was brought to have the increasing surplus profits of a charity-school, founded by the crown, applied for the benefit of the master; but he was not made a party. Cross bill to have them applied for the benefit of the poor children. *Per* Lord Chancellor—It is unfortunate that charity causes are too often reduced to the single question of costs. The present information ought to be dismissed, if it was not for the cross bill: it is plainly the cause of the master. The rule that an information ought not to be dismissed without a

4 Mar. 1748, cor. Hardw. C.
Attorney-General v. Smart,
1 Ves. 72.

decree, when on behalf of a charity, is true in general; but that applies only to private charities, and not to those founded by the crown. The present is a royal foundation; and there is a particular direction by the last charter for the application of the revenue, by which also the charity is already properly regulated. If the whole revenue had been appointed for the master (a) it might be a ground to apply for the increasing surplus. The present is an unnecessary information, calculated to exhaust the whole revenue for the master's benefit, and take it from the poor boys, in contradiction to their right. Dismissed at the costs of the relator.

(a) As in the case of Thetford School, 8 Co. 130.

13 Nov. 1753, cor. Hardw. C.
Attorney-General v. Johnson,
Ambl. 190. 1 Eq. Abr. 100.

6. Sir David Williams by will 15th January 1612, devised the whole profits of the tithes in Gwenther to be disposed of for ever to the uses thereafter specified, and then gave to several charities and other public uses several certain sums to be paid annually; all which sums taken together made up the value of the tithes at that time. The tithes had since been greatly increased, and now produced annually more than sufficient to answer these particular sums in the will.

A question now arose, Whether the surplus should be applied in augmentation of those uses, or should go to the heir at law? The case of *Thetford School* was cited at the bar to the purpose; but a difference was insisted upon, that the estate in that case was given to feoffees. In this case the heir at law was the trustee; and testator might intend if any surplus, his heir at law should have it. But in *Thetford School's* case, the surplus must have gone to the feoffees. Indeed, at the time that case happened, courts of justice had not discovered that the feoffees would be trustees for the heir at law of the surplus, if there should be any. But this case was stronger than that, for the testator declared the whole profits should be applied; and being the case of tithes, it was much stronger still, because tithes are uncertain, and might by this time have been of much less annual value by changing the arable into pasture, &c. Lord Chancellor said, it was a clear case, and referred it to a Master, but his lordship said, he did not intend all the uses should be proportionably augmented, such as 10 s. for an annual sermon, &c.; as they needed no greater allowance, unless, as the clergy in *Wales* were in general ill provided

8 Co. 130

Vide Attorney-General v. Coventry Corporation, 2 Vern. 397.
Cordell v. Noden, Prec. in Ch. 12. and Attorney-General v. Sparkes, Ambl. 203. which was determined on the authority of this case.

provided for, the augmentation was to be considered as adding to this provision.

7. *William Tymperon* in 1723 devised his manors, lands, &c. to pay debts and certain annuities, and then to pay six poor people of *Aldborough* and *Beverley* 2s. 6d. per week, and 4l. per ann. for ever to the minister of *Humbleton*. Upon a bill to establish this charity, a question arose, Whether the surplus rents should go to the heir at law, or be applied in augmentation of the charity? His Honor thought the intention of the testator was clearly to dispose of his whole estate to the charity, and not the surplus to his heir at law. Decreed therefore the surplus to be applied in augmentation of the charity, which may be done by increasing the allowance, if not the number of objects.

6 Dec. 1753, cor. *Strange*, M. R.
Abt. *Hardw. C.*
Attorney-General v. Sparks,
Ambl. 201.

8. Where a residue is bequeathed to a charitable use, and it turns out to be more than adequate to the number of the objects, the whole must be applied to similar purposes.

Vide Attorney-General v. Johnson, *Ambl. 190.*
Attorney-General v. Mayor of Coventry, 2 Bro. P. C. 236.
Arnold v. Attorney-General,
— *Show. P. C. 22.*

M. 1791, cor. M. R.
Attorney-General v. Earl of Winchester, 3 Bro. Ch. Ca. 373.

The Rev. *Robert Chapman* gave all his residue to his executors, in trust, to pay 12l. per ann. to a proper schoolmaster, for teaching the children of *Ravenstone* to read, write, and cast accounts at some convenient place there, to lay out 20s. yearly in the purchase of books for the use of the school, and to apply the surplus, if any, in cloathing, and putting out apprentices, two children of the parish of *Ravenstone*, and one child of *Little Woodston*; and to meet once a year to inspect the management of the school and its accounts, &c.

The testator died in 1785, leaving only a sister and a nephew. The information prayed the establishment of the charity, and that, if the residue was more than sufficient, the charity might be extended.

The nephew, as one of the next of kin, claimed a distributive share of such surplus, and stated, that considerable part of the residue consisted of mortgages, or some other real securities. But the sister disclaimed any right or interest, being desirous that the charity should be established.

The executors admitted mortgages to the amount of 2200l., and a surplus beyond the precise number of objects specified by the will, and submitted that the charity ought to be extended.

It

It was referred to the Master to take an account of the personal estate.

After the decree, the sister assigned all her interest in the mortgages and residue to the trustees, for the benefit of the charity. In consequence of this assignment a supplemental information was filed, and the cause came on again.

Two questions were made,

1st, Whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the statute of mortmain?

2d, Whether the surplus should not go to the next of kin; or whether the court should consider the whole as disposed of by the testator, from the next of kin, and be at liberty to extend the charity by enlarging the number of objects?

Per M. R.—The question is, Whether the whole surplus of this personal estate is not intended to go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified? The real intention of the testator is perfectly clear, that he meant to give the whole surplus. A distinction has been made, that where there is a definite object, and that cannot take place, the court will not look for another object, but let the property go to the next of kin, or the heir at law, as in the *Attorney General v. Bishop of Oxford* (a). The only object the testator had in view, was the building a church, or in fact, creating a pillar of vanity; that was his sole idea, and nothing short of that could answer his intention, and therefore the object must be effectuated in toto, or the property fall to the next of kin. So in the *Attorney-General v. Goulding* (b), where it was held, that the testator had no general intention beyond that specified in his will, and consequently that the bequest must be confined to the precise object, and not beyond it; but wherever the intention has been to dispose of the whole property to certain purposes, as in the early case of *Thetford School* (c), and numerous subsequent authorities, the whole has been applied, the intention has been considered as such, and it has been only inferred that the testator had been mistaken merely as to the quantum. It has been observed, as a strong mark of his intention, that by giving the apprentice fees to three objects, he has marked out the limits of his bounty, and that the confining it to that number

(a) 1 Bro. Ch. Ca. 444. (n.)

(b) 2 Bro. Ch. Ca. 428.

(c) 8 Co. 130.

number will be a sufficient compliance with his intention; but according to the disposition of this residue, his intention could not be limited to three boys; and if it would pay more, the testator has shewn an intent that the surplus beyond that must be applied in the same manner; therefore his Honor was of opinion, it must be applied to the charitable purposes mentioned in the will. Perhaps it may not turn out to be much more than sufficient; but if it should, the next of kin may then come to the court, as in other cases, where there has been an increase of rents and profits. And decreed accordingly.

9. *William Adams* obtained a patent constituting the *Haberdashers' Company* a body corporate, to be governors of the revenues, &c. of *Newport School*, and in *November 1656* by indenture he conveyed and settled land for the maintenance of the school, with special directions as to part of the rents in favor of his relations. The land was directed to be let for a certain term, subject to a rent which was then adequate to all the founder's purposes. At the expiration of the lease the land was of considerably greater value. Upon an information on behalf of the charity, a question arose, Whether the surplus with its increase resulted to the charity under the general trust, or to the heir at law? By the answer of the heir, it appeared that the founder had formerly settled another estate (previous to the settlement of 1656) upon this charity, and had provided, that if any money should arise by fines, it should go to increase the charity; but being afterwards apprehensive that the estate settled was not sufficient, he purchased and settled the estate comprised in the deeds of 1656, and the estate first settled was decreed to be re-conveyed upon a suggestion admitted that the other was of greater value. *Per Cur.*—There is no doubt but the claim of the heir is contrary to the intent of the founder and of all parties. A little difficulty has been introduced by the anxiety of the founder to make a provision for some of his relations consistent with the trust. It is plain that the founder, by the special care he took of his relations, was desirous that his intended provision for them should continue as long as his family should be existing to have the benefit of it, and during that time the charity could receive no improvement, because there was no fund

13 Nov. 1792, cor. Lds. Comrs.
Attorney-General v. Tonner,
2 Ves. jun. 1.
4 Bro. Ch. Ca. 103. S. C. nomine
Attorney-General v. Haberdashers'
Company and Tonna.
Case of Newport School.

fund beyond that. When that object was at an end, then the trust ceased as far as respected the confinement of the charity to a certain sum, and then the remainder of the deed would be to be executed. Therefore there was no intention in favour of the immediate heir, much less in favour of a remote heir. The surplus does by the constant rule of this court result to the charity, who take the benefit by enlargement of the original trust, or some other way under the authority of the court. It would violate the intent of the founder, and disappoint the charity to decree this surplus to the heir. Declare therefore, that there is no resulting trust for him, and that the trustees do account for the rents and profits, and that the Master do prepare a plan for the application of the surplus, having regard to the directions of the founder.

Vide Attorney-General v. Sparkes, Ambl. 201.

SEC. 9. Of the Commission and Commissioners, their Inquisition and Decree: And herein of Exceptions to such Decree.

M. 1689, cor. Lds. Comrs. Saul v. Wilson, 2 Vern. 118.

1. NO appeal lies to the House of Lords from a sentence in the Delegates, nor from a decree on the statute of charitable uses; for they cannot have any original jurisdiction, being grounded on acts of parliament which give them none.

27 Jan. 1690, cor. Lds. Comrs. *Tay v. Slaughter, Prec. in Ch. 16.*

Vide Attorney-General v. Rye & al. 2 Vern. 453. and the cases there cited.

2. Tenant in tail settles lands for a charity; and in 1652 a decree was made by the commissioners of charitable uses for applying such lands to the charity; then the estate tail being spent, Plaintiff, who was the remainder-man in fee and an infant, excepted to the decree that he ought not to be bound, not coming in under the tenant in tail. *Per Lords Commissioners*—All appointments by tenant in tail to a charity are good by the statute, and binding against the remainder-man as well as against the issue in tail. Decree confirmed with costs.

11 April 1694, Dom. Proc. *Warner v. North, Show. P. C. 110.*

Vide Saul v. Wilson, 2 Vern. 118. where it was determined that no appeal lies to parliament

3. Lord Chancellor by his decree having overruled the exceptions taken by the appellant to a decree of the commissioners for charitable uses concerning a gift under Bishop Warner's will, the same

same was read, and the parties were ordered to answer: but the appeal being afterwards withdrawn, the decree was affirmed by the Lords.

from a decree of the Commissioners of Charitable Uses, nor from a sentence in the Delegates.

4. Dr. Downham having given lands for the maintenance of a master and usher of *Pocklington* school, and they being incorporated by act of parliament in 1661, in consideration of a fine and the surrender of a former lease, granted a term of 81 years to Sir *William Reresby*; the exceptant's father, at 24*l.* per annum. Upon a commission of charitable uses, it was found by inquisition that the lands in question were of the value of 133*l.* 16*s.* 8*d.* per annum; whereupon the commissioners decreed the exceptant to deliver possession to the trustees, and to pay the arrears of rent after the rate of 133*l.* 16*s.* 8*d.* per annum. Sir *William* having excepted to this decree, Lord *K.* confirmed it, and directed a commission to ascertain and set out the charity lands which were intermixed with those of the exceptant.

H. 1700, cor. Wright, C. S.
Sir *Wm. Reresby v Farrer* and
another, 2 Vern. 414.
Case of *Pocklington School*.

5. A decree was made by the commissioners of charitable uses; and exceptions being taken to it, they now came before the *Master of the Rolls*; who, together with most of the bar, doubted whether by the statute of 43 Eliz. c. 4. his Honor could hear an appeal, and might affirm the decree and give costs, the statute mentioning only the *Chancellor*; but the Register said it had always been an exception, and therefore his Honor would do nothing in it.

P. 1700, cor. M. R.
Rockley v. Kelley,
Prec. in Ch. 111.

By the statute of 43 Eliz. c. 4. authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the duchy of Lancaster respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors,

upon exceptions taken thereto. But though this is done in the Petty Bag Office in the court of Chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And, as it is thus considered as an original cause throughout, an appeal lies of course from the Chancellor's decree to the House of Peers (a), notwithstanding any loose opinions to the contrary (b). 3 Blackst. Com. 427, 428.

(a) Vide Duke's Ch. Uses, 62. 128. *Burford Corporation v. Lenthall*, 2 Atk. 553.

(b) Vide *Saul v. Wilson*, 2 Vern. 118.

6. Dr. S. by will in writing gave 200*l.* to the parish of C., and after P. the reader coming to pray with him, his wife put him in mind to give 200*l.* more towards building the church. The Doctor said he would give it, and bid P. remember it. The next day he bid P. remember what he said the day before, and died that day. Within three or four days the Doctor's wife put down a

T. 1704, cor. Wright, C. S.
Philips v. Saint Clement Dans's
Parish, 1 Eq. Abr. 404. pl. 2.

me-

memorandum of the devise, and so did the maid, *P.* died a month after; and among his papers was found his own memorandum, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.*, and purporting that he had put it in writing the day it was spoken; but that writing, which was mentioned to be made the same day it was spoken, did not appear, and these three memorandums did not expressly agree. About a year after, on application by the parish to the commissioners of charitable uses, and producing these memorandums, and on proof of Mrs. *S.* and her maid, they decreed the 200*l.*; but on exceptions taken to their decree by the executors, Lord *C.* held it not good, because it was not proved by the oath of three witnesses, (according to the statute,) *P.* being dead.

T. 1705, cor. Wright, C. S.
Corpus Christi College, Oxon, v.
Naunton Parish, Gloucester,
2 Vern. 507.

7. In this case an issue at law was directed upon a re-hearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree had been twice confirmed.

T. 1714, cor. Harcourt, C.
Jenner v. Harper,
1 P. Wms. 247. Salk. 163.
Prec. in Ch. 389.
2 Eq. Abr. 191. pl. 5.

8. Tenant in tail made a nuncupative will, which was afterwards reduced into writing, and by it he devised that his executors should purchase a piece of ground at *Cricklade* in *Wilts* for erecting a free-school there, and gave to the school a rent of 20*l.* per annum, to be paid out of the said lands. The will was made, and the testator died before the statute of frauds; the will was proved as nuncupative; and the executors, in pursuance of the will, bought the ground and built the school. Whereupon the commissioners for charitable uses decreed the issue in tail to pay the arrears of the rent-charge to the school. Upon this the issue in tail excepted to the decree; and the exceptions coming on before Lord Chancellor *Harcourt*, it was insisted for the decree, that though this was void as a will, yet it was good as an appointment under 43 *Eliz.* (a). Lord Chancellor took time to consider of the matter, and then his lordship allowed the exception, and reversed the commissioners' decree, forasmuch as at common law lands or a real estate were not deviseable; and for that it is as much required by the statute of 32 *H. 8.* as by the statute of frauds that such a will should have three witnesses; and as in *Johnson's* case (b), where a devise of land (in writing) to a charity, since the statute of frauds, but not attested by

(a) *Vide* Attorney General v. Rye, 2 Vern. 453. In a keld's report of this case, it is said that the statute of *Eliz.* which favoured appointments to charities, is repealed *pro tanto* by the statute of frauds.

(b) Attorney-General v. Baines, 2 Vern. 597. Prec. in Ch. 270.

three witnesses, was held to be void; so a devise of land without writing should be void also, especially it being by a tenant in tail, and of a rent too which cannot pass but by deed; and his lordship said it would be very dangerous to allow of nuncupative wills of land (c).

(c) To this the reporter P. W., puts a quere, and refers to Stoddard's case, Duke's Char. Uses, 81. where A. before the statute of frauds devised a rent-charge out of lands to a charitable use, and willed that the scrivener should put it into writing, which was accordingly done. Decreed that this nuncupative will was good; for "though a rent cannot be created without deed, yet by the words of 43 Eliz. it may be appointed without deed; and though the nuncupative will be void as a will, it is good as an appointment;" and it seems that the statute of 43 Eliz. which makes these appointments to charities good, being subsequent to 32 Hen. 8. of wills, supercedes and repeals that statute; but it is true that the statute of frauds and perjuries being subsequent to the statute of Eliz. does repeal that statute; and therefore, since the statute of frauds, an appointment of lands to a charity by a will not attested by three witnesses is void.

9. A person, who was summoned to appear before commissioners of *charitable uses*, and did not appear, may except to their decree if concerned in interest.

T. 1725, cor. King, C.
Rawson v. Turner,
Set. Ca. in Ch. 42.
2 Eq. Abr. 202. pl. 5.

10. A commission issued to inquire into the misemployment of several charities within the Borough of *Ilchester*, and the commission directed the commissioners to inquire by *twelve lawful men of the said borough in the county of Somerset, or other lawful means*, concerning any appointments to or abuses of any charities within the said borough. Objected, 1st, that the commission was to inquire for this *borough only*, and not for the whole county. 2dly, That if such a commission was proper, yet the authority to summon a jury was not legal; but that especially since 4 & 5 Ann. c. 16. of the body of the county. Lord Chancellor *Hardwicke*—The first objection is grounded on the words of the said act, which says, *Inquiry shall be made by twelve lawful men of the county*; and the objection supposes that it is *absolutely necessary that every such commission should be for the whole county*; but he saw no foundation for it, *the statute does not fix the extent, but only the objects of every such commission*. Had the legislature defined the bounds of those authorities, they must have pursued the directions of the act; but as it has not, there is no reason to find fault with such a limited commission as this. As to precedents, there are some produced, viz. eight instances of such commissions between 1 Jac. and 7 Car. for separate places; and if the words of the act had been stronger, *after such a series of precedents*, it ought not now to be made a question, Whether those were called commissions? A series of

M. 1738, cor. Hardw. C.
Case of the Borough of Ilchester,
2 Eq. Abr. 200. pl. 7.

of precedents against the plain words of an act of parliament have made a law, as in the case of *Bewdley*, 13 Ann. which was a *sci. fa.* to repeal letters patent, the *venire facias* was awarded *de vicineto*, and there was no doubt but that (it being a private suit of the crown to repeal its own grant) the case came within the statute; and the king was bound by the act, as being a remedial law; but upon producing precedents in the Exchequer in civil suits of the crown, where the *venire* had been so awarded, after the 4 & 5 Ann. c. 16. though they had passed *sub silentio*, yet all the judges at *Serjeants' Inn Hall* were of opinion, that such a series of precedents had cured the mistake. As to the other objection, that the authority to summon the jury is too confined, and should have been from the body of the county, what is said relating to 4 & 5 Ann. c. 16. can have no weight; that statute concerning issues only, to be tried in actions out of the courts of record at *Westminster*; this is only an inquest awaked by act of parliament, and what arises from the 43 Eliz. that the inquest shall be by men of the county, is answered by the commission itself, viz. twelve men of the said borough in the court* of S.; and this objection, as well as the former, is answered by the precedents in all such limited commissions. But it is said, that it appears by the return, this jury which came out of the town hath inquired about lands lying out of the town in the county at large; the answer is, that such lands concerning such charities founded within the town, and the jury summoned under this commission might as well inquire into lands out of the town, at juries in general commissions for counties inquire about lands lying in different counties that are annexed to charities founded within the limits of those counties through which their commissions extended; and this is done daily. His lordship therefore thought their commission good and properly executed; and he over-ruled the exceptions.

A commission may be directed to inquire for a town as a county, and a jury may come out of the town only and inquire of lands lying out, if annexed to a charity founded in the town.

6 Dec. 1739, cor. Hardw. C.
Cheefman v. Partridge
 1 *alk.* 436.

11. T. C. by will in *March* 1730 devised in the words following: "I give to the charity-school of *Yeovil*, to be paid twelve months after my decease, the full and whole sum of 50l. Item, I give

* Q. if this should not be county?

" give unto the *Latin* school, if any man is
 " possessed of it that teacheth boys and is richly
 " grounded in the *Latin* tongue, the sum of 5 *l.*
 " to be paid him yearly for teaching and instructing
 " three boys. *Item*, I give to the poor of *Yerwill*
 " 50 *s.* a year, to be paid every *Easter* after my
 " decease out of my estate of *Homer*, to be paid by
 " my executrix. *Item*, I give my wife *S. C.* that
 " estate in *Homer* and also that at *Wandall*, to her
 " and her heirs for ever," and made her executrix.

Defendant was schoolmaster; but the 5 *l. per ann.* was never paid to him.

The commissioners of charitable uses ordered testator's widow within one month after notice to pay defendant 10 *l.*, &c. and that the proprietors of the lands called *Homer* should yearly pay the schoolmaster 5 *l.*, and decreed that the lands called *Homer* were charged with the payment of 5 *l.* for ever. To this decree testator's widow took the following exceptions:

1st, For that the estate called *Homer* devised to her was not charged by the testator's will with the 5 *l. per ann.* as adjudged in the decree.

2d, For that if the said estate was charged with the 5 *l. per ann.* the same was not by the will made a perpetual charge thereon, nor payable at such times or in such proportions as adjudged by the decree.

Per Lord Chancellor—The will is so inaccurately penned, that it seems the testator made it himself: but though it cannot take place according to the words, the court must make such a construction as is most agreeable to the intention. The testator seems to have had two intentions: 1st, To give his money legacies independant of his annuities, and in gross sums; for the first legacy is *the full and whole sum of 50 l. to be paid a twelvemonth after his death*: 2dly, An annuity of 5 *l.*, and another of 50 *s.*, to be paid yearly every year after his decease.

The question is, Whether the annuity of 5 *l.* is a charge upon the estate at *Homer*? In the first place, What is to be the continuance of this 5 *l. per ann.*? And that will determine in some measure the other question, Whether the estate at *Homer* will be liable to answer it? Lord Chancellor was of opinion that this was intended by the testator as a perpetuity; for he did not give it to a particular schoolmaster, but to the school itself, which is

Vide 2 Ventr. 349.

* *Vide* Edgell v. Haywood,
3 Atk. 352. 357.

† *Cole v. Rawlinson*, 1 Salk. 234.
Hopewell v. Ackland, 1 Salk. 239. are to this point.

like the old case of a gift to the parish church of *Saint Andrew, Holborn*, which was construed to be a gift to the parson and parishioners of *Saint Andrew* and their successors for ever. Another circumstance; that it is in general words for the instruction of *three boys*, which must be understood to mean three boys in succession. There can be no question as to the charging his estate at *Homer*, for he has made it liable in express terms; and the calling his wife executrix in this clause is only another description of her, for the words immediately following give the inheritance in this estate to the wife *. Lord Chancellor said, it could not be charged upon the testator's personal estate, because the real estate is expressly set apart to answer the annuities; for what the testator means by his respective legacies are the pecuniary sums, or sums in gross that are before given in other parts of his will. The next question is, as the fund intended for the school is not sufficient, Whether the estate at *Homer* be liable to make up the deficiency? *Item* ought to be construed as a conjunctive, in the sense of *and* or *also*, to connect the two sentences together and make the estate at *Homer* as much liable to one annuity as the other, for *item* has never been construed a disjunctive, but is only made use of to distinguish the clauses in a will †.

The time of payment is at *Easter*; and it is directed to be paid half yearly, which naturally intends taxes: this court cannot alter it to half yearly payments and clear of taxes. Decreed the exceptions to be over-ruled, save as to the time of paying the 5*l.* per ann.; and as to that the exceptions must be allowed, and that so much of the commissioners' decree as directs the 5*l.* per ann. to be paid half yearly, at *Michaelmas* and *Lamb-day*, be reversed, and that the arrears be forthwith paid to the defendant, and that the 5*l.* for the future be paid yearly at *Easter*, subject to the land-tax. The rest of the commissioners' decree his lordship confirmed.

26 Jan. 1741, cor. Hardw. C.
Aylst v. Dod, 2 Atk. 238, 239.

12. *T. A.* by will charged his lands in *E.* with 10*l.* per annum for maintaining a schoolmaster and repairing the school. The annuity was to be paid half-yearly; and if in arrear 42 days, 5*s.* per week was allotted *nomine pene*.

A com.

A commission of charitable uses issued; and upon the inquisition it appeared the schoolmaster-ship had been vacant six years.

The commissioners summoned the owner of the land charged; but he making default, they awarded him to pay the six years' arrear and the *nomine pena*, amounting to 45*l.*, together with costs.

Two exceptions were taken to this decree:

1st, That testator only gave the annuity while there was an actual schoolmaster, and that the vacancy was not owing to any fault of the exceptant:

2dly, That if the exceptant should pay the arrears of the annuity, he ought in equity to be relieved against the *nomine pena*.

Lord Chancellor over-ruled the first exception, comparing it to the case of a charity for maintenance of alms-people; where, though there may not be persons sufficient to answer the description of the charity, yet the land charged shall not be discharged, but the annuity shall accumulate, to advance and increase the charity.

As to the second exception, his lordship said that the 5*s.* per week allowed by way of *nomine pena*, after the 42 days, should only stand as a security for legal interest where the principal sum is not regularly paid.

In the case of a lease, the whole *nomine pena* shall be paid by a tenant ploughing up old pasture ground, for that is a compensation to the landlord for altering the nature of his land.

As to the costs, his lordship said it had been determined that the commissioners of charitable uses have no power under the 43 *Eliz. c. 4.* to give costs; but this court can do it; and costs were decreed against the exceptant in the present case.

13. Exceptions had been taken to the decree of the defendants as commissioners of charitable uses, and 39 exceptions out of 43 were allowed; but there being some doubt as to costs, Lord Chancellor took time to consider of that question, and this day delivered his opinion. *Per Lord Chancellor*—Six precedents have been produced (*vide margin(a)*) in which costs were given; and as the point was thus settled, his lordship would follow the justice of these cases, whatever doubts he might have had originally himself. It was contended by the respondent's counsel that the precedents cited were erroneous, because no authority was given to the Chancellor to award costs by the 43 *Eliz.* Notwithstanding the verdict of a jury, or a decree of the commissioners of charitable uses, the court of

9 May 1743, cor. Hardw. C.
Burford Corporation v. Lenthall
& al. 2 Atk. 551.

(a) *Chapman v. Inhabitants of Tedbury*, cor. Coventry, C. S. in 1629.

Case relating to Crowland parsonage, cor. Nottingham, C. 29 Feb. 1676.

Case of Bromley College, cor. Somers, C. S. in 1693.

A case, cor. Lds. Comrs. in Hil. 1700.

Christ-church v. Newton Inhabitants, cor. Wright, C. S. in 1704-5.

Hancock v. Walker, cor.
Cowper, C. S. in 1715.

Chancery may still (under the 9th section of the statute) permit a suit to be instituted in this court, in which the exceptants are considered as *plaintiffs*, and the respondents as *defendants*, and put in an answer upon oath; and in the examination of witnesses in the cause, neither side is bound by what appeared before the commissioners, but may set forth new matter if they think proper. This has made the court all along consider it as an original cause, or otherwise the court would have known nothing of the merits. The court, therefore, have mixed the jurisdiction of bringing informations in the name of the Attorney-General with the jurisdiction, derived from the statute, and proceed either way, according to their discretion. It is said the courts ought to resort back to the original jurisdiction in point of costs upon arguments chiefly drawn from cases of costs at law and the old acts, the statute of *Marlebridge*, 52 H. 3. But courts of equity have in all cases done it, not from any authority, but from conscience *et arbitrio boni viri* as to the satisfaction on one side or other on account of vexation (b). But still it is said this arises on the common law side, as it comes out of the Petty Bag. The return of the commission indeed being in that office, the Petty Bag retains the proceedings, yet it comes before the Chancellor personally, and not in his ordinary or extraordinary jurisdiction. Lord Chancellor desired to know by what authority he could give costs in bankruptcy, if he could not give them in this case; for it would be difficult to shew from the bankrupt acts that he had any such authority. It is only by orders signed *propria manu* and processess of contempt; the same as to commissions of lunacy; for though it is said the whole arises from the sign manual of the king, yet his lordship said it does not. After the jurisdiction of the court of wards was taken away, the jurisdiction over lunatics and ideots reverted back to the court of Chancery, to whom it originally belonged; and the royal sign manual is a standing warrant to the Lord Chancellor to grant the custody of the lunatics, which is a beneficial thing in cases of ideocy (c). Therefore it is not an authority in the Lord Chancellor, arising from his ordinary or extraordinary jurisdiction, but a personal one, and very difficult to maintain, upon a nice foundation, how this authority of costs did arise, but falls exactly within the cases of bankrupts and ideots.

(b) Jones v. Cozeter, 2 Atk. 400.

(c) *Vide* Matter of Holi, a lunatic, 3 Atk. 635.

ideots. See the case of *Bewdley Corporation (d)* relating to awarding *venires de vicineto et de corpore comitatus*, where the court was governed by precedents of about seven years standing before the issue of the *venire*. So likewise in the cases of justices of peace they have taken upon them to exercise several jurisdictions which the court of King's Bench would not have allowed, if it had come originally before them. His lordship, therefore, was of opinion he ought to be bound by the precedents cited, especially as it is in aid of justice. The question then is, What ought to be done as to the costs above and the costs below? As to the costs above, his lordship decreed the exceptants to have their costs where they had prevailed, and the respondents their costs where they had prevailed (e); and as to the costs below, his lordship would not interfere, but said they must rest upon the agreement between the parties.

(d) 1 P. Wms. 207.

(e) *Vide Aylet v. Dodd*, 2 Atk. 238.

SEC. 10. Of the Order and Priority which shall be observed with respect to Charity Legacies in the marshalling of Assets.

1. *A.* By will (*int. alia*) bequeathed 40*l.* to a charity; and the estate falling short of assets to answer all the legacies, the spiritual court was of opinion that the charity legacy should be fully paid in the first place, and not in average; whereupon plaintiff filed his bill for an injunction against the proceedings of the spiritual court; but *Lord Keeper* refused to grant the injunction, as the spiritual court had the proper jurisdiction of all legatory matters.

H. 1683, cor. North, C. S. *Fiddling v. Bond*, 1 Vern. 230.

2. Husband borrows money to buy him a place; he and his wife mortgage the wife's land, and levy a fine; after which the husband by will gives legacies to charities to the amount of his personal estate. The mortgage shall be paid out of his personal assets, though the charitable legacies are lost thereby; but all the husband's debts, though by simple contract, shall be preferred to the mortgage.

M. 1714, cor. Cowper, C. *Tate v. Austin*, 1 P. Wms. 254. 1 Eq. Abr. 62. pl. 5. 2 Vern. 689.

Vide Masters v. Masters, 1 P. Wms. 422. and Attorney-General v. Hudson, 1 P. Wms. 675. where charity legacies abated in proportion with other legacies on a deficiency of assets. *Sic in Attorney-General v. Robinson*, 2 P. Wms. 25.

Vide Notes to the principal case, ante, tit. Baron and Feme, f. 7. pl. 8.

P. 1718, cor. M. R.
Masters v. Masters,
 1 P. Wms. 423.
 2 *Eq. Abr.* 192. pl. 7. 322. pl. 13.
 352. pl. 12. 366. pl. 7. 554.
 pl. 10.

Vide Tate v. Austin, 1 P. Wms. 265. *Attorney-General v. Robins*, 2 P. Wms. 25. *Attorney-General v. Hudson*, 1 P. Wms. 675.

M. 1720, cor. Parker, C.
Attorney-General v. Hudson,
 1 P. Wms. 674.
 2 *Eq. Abr.* 192. pl. 9.

3. Charity legacies (being pecuniary and not specific) shall, on a deficiency of assets, come into average with other pecuniary legacies; for, though preferred by the civil law, they are but legacies.

4. Testator by his will gave 500*l.* to a *charity-school* and several pecuniary legacies to his *poor relations*, and died. His executors (*int. al.*) insisted on want of assets. Lord Chancellor said, that in case of a deficiency of assets, all pecuniary legacies, as well those to charity as others, should abate in proportion; for though the Romans preferred a pious or charitable legacy to others, yet our law does not; they being all but legacies, and equally intended by the testator to be paid, it would be hard that one of them, by being preferred, should frustrate all the rest; besides, all the other legacies being to several of the testator's *poor relations*, they are *charities also* (a).

(a) *Vide* Case of Caroon House at Lambeth, Finch, 353. *Fielding v. Bond*, 1 Vern. 230. *Attorney-General v. Robins*, 2 P. Wms. 25. *Masters v. Masters*, 1 P. Wms. 423. *Tate v. Austin*, 1 P. Wms. 265.

22 July 1748, cor. Hardw. C.
Arnold v. Chapman, 1 Ves. 108.
Case of the Foundling Hospital.
 This case is fully stated, ante,
 § 3. pl. 2.

5. In this case Lord H. said, that as to the rule of marshalling assets, he must take it to be the same as it was before the statute of mortmain; and if 1000*l.* was devised, and debts charged on real and personal estate, the rule before the statute was, that the debts should be paid out of the real estate, and the legacies should come on the personal. His lordship said, the court would do the same now, not by way of standing in the place of creditors, but by turning the debts on the real estate. But that, his lordship said, was no rule, where real and personal was charged, and the residue given to a legatee or children; the court would not, in such case, turn the charge on the real, to give the whole personal estate to the legatee.

26 Nov. 1750, cor. Hardw. C.
Mogg v. Hodges, 2 Ves. 52.

6. *Jane Churchill* directed her real estates to be sold, and her debts and legacies to be paid out of her personal estate, and residue to her trustees, to be distributed in charities as they should think proper, particularly recommending to them the hospital at *Bath*. The trustees agreed that all money arising from a real estate is to be accounted as real; the bequest was so far void by 9 *Geo.* 2.; but desired that, in compliance with the intent of the

the testatrix, the assets should be so marshalled that all the other legacies should be paid out of the real estate, and so the personal go to the charity. Lord Chancellor said, this is contrary to the express direction of the testatrix, who desires, first, that her legacies and debts should be paid out of the personal. In *Dalton v. James*, the debts and legacies were charged on both estates; but the assets cannot be so marshalled as to support a legacy contrary to law. *Decreed* that the trust must either take effect according to the whole intent, or not at all; and as all money arising from the sale of a real estate was still to be accounted as real, so all lands to be bought with personal were still to be considered as personal. *Ex relatione.*

not grant; therefore the charter was inserted in the act, and is to be construed as any other charter given by the king only. The clause mentioned was inserted to avoid the trouble of applying for a licence in mortmain, and was considered as such a licence, that the governors are thereby empowered to take lands to such a value, but still with a proviso that they are granted to them in the manner prescribed by that law.

In this case it was argued that the Hospital at Bath, which was incorporated by parliament, had some particular clauses in it contrary to the statute of Mortmain, and consequently in those particulars not subject thereto. But Lord Chancellor said that the words in that act were to be considered as in a charter, that the charter of incorporation was only granted by parliament to avoid expence to the promoters of that charity, who were forced to apply to parliament for some other powers, which the crown could

7. Upon the question as to marshalling assets in this cause, Lord H. said he would not set up a new rule for the benefit of charities, but they might have the benefit of the old one. When there are general legacies, and the testator has charged his real estate with payment of all his legacies, if the personal estate is not sufficient to pay the whole, the court has said, the legacy to the charity shall be paid out of the personal estate, and the rest out of the real estate, that the will of the testator may be performed *in toto*.

M. 1752, cor. Hardw. C.
Attorney-General v. Groom,
Ambl. 158.

8. *B. T.* being possessed of a term for years in land and other personal estates, (but not seized of any real,) by will in 1751, after directing payment of his debts and legacies, devised the residue of his real and personal estate to trustees, to be managed in the best manner they could, and the income to be applied towards cloathing the poor inhabitants of his grandfather's hospital at *Abingdon*; and when there should be no such hospital, he directed the same to be disposed of among such poor of the *Baptist* nomination as his executors should think proper. After argument at bar, Lord *Hardwicke* said, it has been determined on the statute against papists, and likewise on the statute of mortmain, that the words "*any estate or interest*" in lands extends to leaseholds. His lordship said his judgment in this case was founded on the point, Whether

14 Mar. 1754, cor. Hardw. C.
Attorney-General v. Tomkins,
Ambl. 216.

this leasehold shall not be applied first in payment of debts and legacies, and the charitable bequest take place out of the rest of the assets? The reason of marshalling assets out of the personal as well as the real is always *ut res magis valeant quam pereant*. As where there are general legacies charged on real estate, if the personal estate is not sufficient to pay the whole, the legacy to the charity shall be paid out of the personal estate, and the rest out of the real. So where there is a particular disposition of the different species of estate, enumerating them, and in the devise of the residue one of them is left out, that part shall be applied first. So where there is a charge on the real estate, and part of it is left undisposed and descends, that part shall be first applied (a). The same rule, his lordship said, might prevail in this cause; for although this court will not set up a new rule of marshalling assets in order to defeat and avoid the statute of mortmain, yet the old rules may and ought to be applied as before those statutes. The bequest is good as to all the personal estate, except the leasehold, which cannot go to the executors; because, 1st, The testator has used words to shew his intention of giving it away; 2d, They are excluded from the undisposed residue by having legacies; therefore it goes to the next of kin, and shall, according to the above rules, be first applied to payment of the debts and legacies, as a real estate descending would be before that part which is devised: and there being more debts and legacies than the leasehold estate would extend to pay, his lordship ordered it to be sold and the deficiency made up out of the other assets, and the rest to be applied to the charity (b).

(a) *Galton v. Hancock*.
2 Atk. 424.

(b) *Attorney-General v. Tyn-
dall*. Amb. 614.

M. 1766, cor. M. R.
Attorney-General v. Caldwell,
Amb. 635.

9. In this case the bequest was general: "That the remainder of all the testator's effects, annuities, mortgages, bonds, or notes, with furniture, &c. be sold, and what money they should sell for he gave to two charitable schools, for boys and girls of *Saint Andrew, Holborn*, in equal moieties." The mortgages were for years.

Two questions arose: 1st, Whether the bequest, so far as related to the mortgages, was void by the statute of mortmain?

2d, Whether the court would not marshal the assets, and apply the mortgages in the first place.

to

to pay the debts, in order to leave the larger fund for the charity?

M. R. was clear, upon the first question, that the bequest was void. The mortgages upon which the court had given judgment were mortgages in fee (a), and the present was only a mortgage for years. But that made no difference, for it was an interest in land (b).

Upon the second question, his Honor distinguished between the case where a mortgage was given as a specific bequest, and where it passed by the residuary bequest enumerated and described amongst the different species of estates, of which the residue consisted. In the former case it could not be first applied to pay debts; but in the latter it might (c).

His Honor gave directions accordingly, that the mortgages should be first applied (d).

10. Testator *W. B.*, by will in 1757, had bequeathed his personal estate, and his estate at *Foxfield*, held by lease of the Bishop of *Winchester*, descendible to his right heirs in trust to sell same, and to pay his debts and legacies; and also to *Winchester College* 100 *l.* for superannuates not succeeding to *New College*; to the county hospital at *Winchester* 50 *l.*; to the charity for relief of widows and children of clergymen 600 *l.*; and after reciting that it was uncertain what his effects might amount to, gave whatever remained, after debts, legacies, and other charges, to his executors, for such charitable uses as they should think fit.

In 1761 the M. R. established the will, &c. and directed that, in case of deficiency of the personal estate, the charity legatees should stand in the place of the specialty creditors, and receive a satisfaction *pro tanto* out of the real estate; but without prejudice to the question, whether the legacy to the college was within the saving clause in the statute of mortmain, which might arise in case the beforementioned marshalling of assets should not be sufficient to furnish the whole of the legacies given to charities; and if the personal estate and rents were insufficient, the real estate to be sold. The personal estate proving insufficient, the estate was sold. The master having reported, the cause was set down for further directions, which were given accordingly.

After

(a) *Vide Hall v. Governors of Grey Coat Hospital. Attorney-General v. Meyrick.*

(b) *Attorney-General v. Graves*, is an authority that a term in gross is within the description of the statute.

(c) *Attorney-General v. Graves. Attorney-General v. Tyndall.*

(d) Mr. Ambler says, this is not properly marshalling assets, but arranging the different species of personal estate.

8 Feb. 1773, cor. *Apsey, C. Hilliard v. Taylor, Ambler, 713.*

(2) In Chancery, cor. Smythe, B.
abf. C. Amb. 704.

After twelve years the above decree was appealed from, on the authority of *Foster v. Blagden* (a).

Lord Chancellor, on that authority, without hearing the reply, reversed the decree, so far as related to the charitable legacies to *Winchester Hospital*, and for relief of widows and children of clergymen, and directed an inquiry what fund was established at *Winchester College* to defray the expence of supernumeraries at either of the universities; and, after ordering the costs, declared that the residue of the 3 per cents. (the produce of sale of the real estate) belonged to the heir at law.

20 Mar. 1783, cor. Thurlow, C.
Middleton v. Spicer,
1 Bro. Ch. Ca. 201.

11. *D. G.* being possessed of leasehold property, by his will directed the same to be sold, and the produce paid to a charity. This devise to the charity being void by the statute of mortmain, and there being no next of kin of the testator, the executors filed their bill claiming the undisposed residue, notwithstanding they had legacies given to them by the will. Lord Chancellor.—It would be pedantry to run over all the cases on this subject which are collected in *Burgefs v. Wheat* (1 Blackst. 123). This is not a case in which the assets can be marshalled, which is never done to make a debt of an inferior nature payable. Here the executors having legacies bequeathed, and being clearly trustees, cannot by any possibility take any beneficial interest. In *Burgefs v. Wheat*, and every other case that is to be met with, the Attorney-General has been a party, which shews it was always the opinion that the crown had such an interest in cases of this kind, that it was necessary to make him a party. The executors are as much trustees for the crown as they would have been for the next of kin, if there had been any. Decreed in favor of the crown; but that the executors should be paid their expences.

25 Dec. 1792, cor. Lds. Comrs.
Makebam v. Hooper & al.
4 Bro. Ch. Ca. 153.
Higlm. on Mortmain, 50.

12. *J. L.* by will devised all his manors, lands, &c. as well freehold as leasehold and copyhold, and all his personal estate, to defendants in trust to sell and convert the same into money, and then in trust out of the produce to pay divers charitable legacies, and 200 l. to the infirmary at *Bath*, also sundry pecuniary legacies to friends, and 200 l. to erect a monument. The surplus and residue testator gave to his two executors, equally to be divided between them. By codicil testator gave several

several pecuniary legacies, and another charitable legacy, without mentioning the fund out of which they were to be raised. One of the executors died in testator's lifetime. Plaintiff, as the survivor and residuary legatee, filed his bill against the trustees, charging that the charity legacies were void by the statute of mortmain, being devised out of the produce of land, and that they sunk into the residue, to which he claimed title. Mr. Solicitor General for plaintiff contended that the cases which had been decided (a) must form the rules of the court. It certainly was not in every case that the court would marshal assets for a charity. Where a legacy was given out of a mixed fund, and to be paid at a given time, it partook of the nature of a charge, and the party could take only a portion of the personal estate. Lord Commissioner *Ashburn* said, he thought the court bound by the recent cases with respect to the question of marshalling, and that they could not marshal assets for charities. But the legacy to the *Bath Infirmary* was ordered to be paid, that charity being permitted to take in mortmain by an act in 19 Geo. 3.

(a) The question has been decided against marshalling assets for a charity in the case of mortgages, *Attorney-General v. Meryrick*, 2 Ves. 44. *Attorney-General v. Martin*, High. 95 (n.) *Middleton v. Spicer*.

SEC. II. Of Informations and other Suits for Charitable Claims; who are the necessary Parties, and what Evidence is admissible in such Cases.

1. A School-house being erected on the waste by the voluntary contributions of the inhabitants of *Clapham*, the lord of the manor enfeoffed eighteen of them in trust, that the inhabitants might for ever have a school as of the gift of the lord. Afterwards, on a dispute, a question arose, whether the trustees or the inhabitants should nominate a master. *Per Lord Keeper*—This not being a free school is not a charity within the statute of *Elizabeth*, and consequently the inhabitants have no right to sue in the Attorney-General's name. His lordship said, if the lord of the manor should erect a mill, and convey it to trustees for the convenience of the inhabitants to grind their corn, the inhabitants should not be admitted to sue in the Attorney-General's name; and unless the plaintiff could produce precedents where the court had relieved in such like cases, his lordship said he would dismiss the bill.

M. 1700, 200. Wright, C. S. *Attorney-General v. Hewer*, 2 Vern. 387.

2. In

1712, cor. Harcourt, C. S.
Attorney-General v. Selby,
 1 Salk. 163.
Vide Attorney-General v.
Wyburgh, 1 P. Wms. 599. S. P.
 accords.

H. 1719, cor. Parker, C.
Attorney-General v. Wyburgh,
 1 P. Wms. 600.
 2 Eg. Abr. 167, pl. 11.
Vide Attorney-General v. Selby,
 1 Salk. 163.
Vide Highm. on Charit. Uses,
 where the principal case is more
 fully stated, and the cases respect-
 ing the admissibility of witnesses
 appearing to be interested are re-
 ferred to.

Highmore says, there is no
 method of making a governor's
 evidence on behalf of his own
 charity admissible if excepted to.
 Nor can he attest a will contain-
 ing a donation to a charity of
 which he is governor.

T. 1719, cor. Parker, C.
Monill v. Lawton,
 2 Eg. Abr. 167, pl. 13.
 4 Vin. Abr. 500, pl. 11.

His lordship said, that, where
 a bill is brought on behalf of such
 a charity to establish it, it must be
 in the name of the *Attorney-*
General ex necessitate rei, because
 there are no certain persons en-
 titled to it who can sue in their
 own names; but in the principal
 case there is no necessity: and
 seemed to admit, that where an
 estate is devised to trustees for cha-
 rities to persons certain, who are
 capable to sue or be sued, such
 persons ought to be made defend-
 ants as well as other cestui que
 trusts. *Ibid.*

In the margin of this case of
Monill v. Lawton, Mr. Viner
 says, "Note; Parker, C. seemed
 to take a difference, where
 trustees of the charity are ap-
 pointed by the donor, and where
 no trustees are appointed, but
 the lands devised immediately to
 charitable uses: in the latter case there can be no decree, unless the
Attorney-General be made a party; but otherwise, where trustees are appointed by the donor. This
 cause proceeded to hearing, and the objections were over-ruled. Per Parker, C." *Ibid.*

16 May 1721, Dom. Proc.
Bishop of Rochester and others v.
Attorney-General,

2. In a bill brought on behalf of a charity, it is
 not necessary to make all the tertenants parties,
 for the charity shall not be put to that difficulty;
 but the tertenants may, if they seek a contribution,
 undertake to make them parties to the information,
 or help themselves by such course as they shall
 think fit.

3. It is not necessary to make all the tertenants
 parties to a suit on behalf of a charity for recovering
 the arrears of a rent-charge. A devise was given
 for cloathing six poor persons in the parish of E.
 Lord Chancellor would not permit any of the
 parishioners who paid the poors rate to be witnesses
 in this case, for that they were eased in their rate
 by the donation to the poor; and when it was
 objected that they were lodgers, and not liable to
 pay the rate, and that it was incumbent on those
 who took the exception to make out the contrary,
 his lordship said the witness was described to be
 "of the parish of E. yeoman," and must be
 intended a housekeeper contributing to the rate,
 unless the contrary be made appear.

4. Bill to establish a will, and to perform several
 trusts, some of them relating to charities; the
 bill was brought by some of the trustees against
 other trustees, and several *cestui que trusts*. The
Attorney-General need not be made a defendant,
 for some of the trustees of the charity are made
 defendants: and there may be a decree to compel
 an execution of the trusts in the will relating to
 these charities. If there should be any collusion
 between the parties in relation to the charity, the
Attorney-General, notwithstanding a decree, may
 bring an information to establish the charity, and
 set aside the decree; so if he is made a defendant,
 if there be collusion. Objected, that one of the
 trustees was not brought to hearing. Answered, that
 he is named a defendant in the bill; but being beyond
 sea, is not amenable to the process of the court, and
 therefore plaintiff may proceed without him; besides,
 the trustee is one of the plaintiffs in the cross-
 cause, and so is before the court. Cur. concessit.

5. In the case of a charity the most expeditious
 and least expensive methods should be adopted;
 and

§ 11. Of Informations, Parties, and Evidence. C— a 157

and where no material fact is disputed, nor any point of law arises but what a court of equity may determine finally, an issue ought not to be directed.

2 Bro. P. C. 287.
4 Vin. 301. c. 12.
2 Eq. Abr. 193. pl. 11.

6. The king *pro bono publico* has an original right to superintend the case of charities, so that abstracted from the statute of *Elizabeth* relating to charitable uses and antecedent to it, as well as since, it has been the constant practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities.

H. 1722, cor. Macclesfield, C.
Eyre v. Countess of Shaftsbury,
2 P. Wms. 118.
2 Eq. Abr. 710. pl. 3. 755. pl. 4.
Gilb. Eq. Rep. 172.

Several things fall under the case of the king as *pater patriæ*, as all charities, lunacies, infancies, &c.

7. Information to establish a charity of lands given by will against the heir at law of the devisor. Defendant by his answer did not insist upon his title, nor did he expressly disclaim; but his counsel at the hearing had not instruction to insist on defendant's title, or to pray a title at law, and thereupon the court decreed the lands to the charity. Upon rehearing, defendant insisted upon his title as heir at law, and that the devise was void. But *Macclesfield C.* would not now allow defendant to insist upon his title, since he had waived it at the hearing, but said he was concluded by it; and though it was admitted to be a doubtful case, he would not suffer counsel to argue it, but affirmed the decree.

M. 1723, cor. Macclesfield, C.
Attorney-General v. Ardern,
2 Eq. Abr. 193. pl. 12.
4 Vin. Abr. 492. pl. 9.

8. In an information by the Attorney-General for the regulation of a charity, the court of Chancery will give a proper direction as to the charity, without any regard to impropriety in the prayer of such information; and herein the case of a charity differs from all others, wherein the decree must be founded on the prayer of the plaintiff's bill.

27 Jan. 1737, cor. Hardw. C.
Attorney-General v. Jeane,
1 Atk. 355.

9. Testator had left a sum of money to be distributed in charity at the discretion of his three executors. One died. This was held to be an authority coupled with an interest which survived to the other two, in whom the determination of the property of every object was left by the testator; and the executors could not divide the charity, and each nominate absolutely. So much of the present information, therefore, as sought a specific performance of a pretended agreement for that purpose, was dismissed with costs, to be paid by the relators; which was said to be the first instance of such a direction.

M. 1738, cor. Hardw. C.
Attorney-General v. Glg.,
1 Atk. 356.

10. Although

About the year 1740, Case.
2 *Eq. Abr.* 12, pl. 21. *MS. note.*

10. Although a charity is not barred in equity by the statute of limitations, yet that statute seems to be a good rule how far back to carry the account.

23 June 1741, cor. Hardw. C.
Attorney-General v. Bucknall,
2 *Atk.* 328.

11. Any person, though the most remote in the contemplation of the charity, may be relator in an information.

4 Nov. 1747, cor. Hardw. C.
Attorney-General v. Parker, Case
of Clerkenwell Parish,
1 *Vef.* 43.

12. The rectory of *Clerkenwell* was inappropriate and vested in trustees for the benefit of the parishioners, by deed in 1656; there was also a perpetual curacy with a pension, but nothing said of the nomination of a curate. Bill to set aside the election made, and to declare and establish the future right of election. *Per Lord Chancellor*—Nothing is before the court to set aside the election made. As to the question, Whether the court ought not to make a decree to settle the right? the general rule certainly is, that an information *for a charity* ought not to be dismissed, but the right settled (a): but that rule does not hold here; for nothing in this case is a charitable use but the pension, which is not in question. There is no ground to establish the present right, nor any proof or examination of it entered into. The court will not at the suit of a few parishioners put the parish to the expence of an issue to settle a right which may not come in question for several years. The whole of this information was dismissed with costs.

(a) *Vide Attorney-General v. Scott*, 1 *Vef.* 413.

4 Mar. 1748, cor. Hardw. C.
Attorney-General v. Smart,
1 *Vef.* 72.
Vide Attorney-General v. Scott, 1 *Vef.* 413.

13. The rule, that an information for a charity shall not be dismissed, but that there must be a decree to settle the right and establish the charity according to the intent of the donor, holds only in cases of private charities, not where founded by the crown.

23 Feb. 1750, cor. Hardw. C.
Attorney-General v. Scott,
1 *Vef.* 418.
Vide Attorney-General v. Parker, 1 *Vef.* 43.

14. An information by the Attorney-General is not to be dismissed, though the particular relief prayed is wrong, if the charity wants any directions.

14 July 1752, cor. Hardw. C.
Attorney-General v. Brereton,
Brereton v. Tamberlaine,
2 *Vef.* 426.

15. Though an information in the name of the Attorney-General to establish a charity is mistaken in the circumstance of laying it, yet if there is a charity, and the right appears, the information cannot be dismissed, but a decree might be made to establish that charity. The augmentation of vicarages is a charity within 43 *Bliz.*

16. A question arose between two charities, viz. the poor of the parish of *A.* and the widows in an alms-house in the same parish, concerning the right to a legacy given by a will, in which there were descriptions applicable to both. The information was at the relation of the latter; but Lord Chancellor thought they were not intended by the testator. The Attorney-General contended that the court had not declared *who was entitled*, and that the general rule was, that the court *would settle the right*, though the prayer of the information did not go to it. Lord Chancellor doubted if that was the practice, and said, the most the relator could claim was to have the information dismissed without costs. The Attorney-General, as a public officer, may act for the charity; but Lord Chancellor believed it had been held, that an information without a relator would not do (a). His lordship said, if he gave costs out of the charity, he ought to give a decree, which he would not, unless the cited cases should induce him to alter his opinion (b).

15 Nov. 1790, cor. Thurlow, C.
Attorney-General v. Oglander,
1 Ves. jun. 246.

(a) When an information only concerns the rights of the crown, a relator is *sometimes* named; but when it concerns those whose rights the crown takes under its particular protection, there is *always* a relator, who in reality sustains and directs the suit. Mitf. 90.

(b) *Vide* Attorney-General v. Parker, 1 Ves. 43. Attorney-General v. Smart, 1 Ves. 72.
1 Ves. 426. Attorney-General v. Middleton, 2 Ves. 327.

17. The information was for establishing a charity under a will. The company were the trustees.

7 May 1791, cor. Thurlow, C.
Attorney-General v. Haberdashers' Company, 1 Ves. jun. 295.

Lord Chancellor—The thing to be distributed is the surplus beyond the repairs and other charges. The Master ought to have reported the shares in aliquot parts, instead of monies numbered, for the surplus must be an uncertain sum. The difference of the land-tax, which may be one year 4*s.* in the pound, and another year 3*s.*, may make a difference in the profits. So may the failure of tenants, &c. Therefore it ought to be distributed in aliquot parts to the proper objects, according to the directions of the testator. As to the execution of the trust, it is not to be kept under the direction of the court, to be executed by the court from time to time, but is to be executed under the general direction of the trustees, which is the only way of administering a charity. Then the first thing they are to do is to repair; which must be *sub arbitrio bonorum virorum*. If the trustees misbehave, there must be another information upon the new ground. His lordship said he could not keep this information here for ever. He knew these applications (by petition) to the court were very expensive; and for that reason he wanted to get rid of it.

18. Where

T. 1792, cor. Lds. Comrs.
Chitty v. Parker,
 4 Bro. Ch. Ca. 33.

71 Dec. 1796, in Seacc.
Attorney-General v. Bolton,
 3 Asstr. 320.

Charity and Charitable Uses. §11.

18. Where a legacy is given to a charity, it is not necessary to make the Attorney-General a party to a bill for an account, &c.

19. Testator had devised certain estates to the defendant's ancestor, charged with an annuity of 16*l.* per ann. as a salary for a clergyman to be appointed by the devisee to reside in the village of A, and preach in the chapel of A., and teach six poor children there. Upon an information by the vicar of the parish, it was insisted no person could preach in the chapel without his licence (which he refused to grant); and that as he did the duty, he was entitled to the salary. Upon the hearing the vicar abandoned his claim, and the court directed defendant to account for the arrears of the annuity, and the remembrancer to receive proposals for the directions of the charity, but the relator not to pay costs, as the information had a foundation.

C—a GENERAL REFERENCES.

Canon Law—see *Chivalry, Delegates, Ecclesiastical Persons.*

Caption of a Fine—*Fine.*

Catching Bargains—*Fraud, Heir, Usury.*

Cautione admittanda—*Writ.*

Caveat—*Decree, Patent.*

Chancellor—*Equity.*

Chancery—*Equity, Jurisdiction.*

Charters—*Corporations, Patents.*

Charter-Party—*Trade.*

Charge—*Account, Rent-charge.*

Clandestine Mortgages—*Mortgage.*

C—c GENERAL REFERENCES.

Certificate of a Bankrupt—see *Bankrupt.*

— of the Recorder—*London Customs.*

Certificate

Certificate of the Judges—see *Judic.*

_____ of the *Master*—*Master* in
Chancery.

Certiorari—*Bill*, *Writ*.

Cessio bonorum—*Bankrupt*, *Foreign*
Laws.

Cestui que Trust—*Trust* and *Trustees*.

Cestui que Vie—*Copphold*, *Estate*, *Land-*
lord and *Tenant*.

Clerk in Court—*Equity*, *Officers*.

_____ *articled*—*Master* and *Servant*,
Solicitor.

Creditor and Debtor—*Debts*, *Debtor*
and *Creditor*.

Creditors, and Proof of Debts—*Bank-*
rupt.

Chivalry.

SIR Henry Blount Bart. was sued in the court of Chivalry for assuming and usurping arms which none of his family ought to bear. In the progress of the cause an allegation was exhibited by the defendant, setting forth that all pedigrees whatsoever must be signed by the proper hands of the parties, requesting such entries to be made in the books belonging to the college of arms, and then objects to the validity of some of the entries in the said books as not being signed, and therefore no credit to be given to them; but this allegation was rejected by the judge of the court of Chivalry, and the defendant petitioned the court of Chancery in order to obtain a commission of delegates to determine the said appeal. On the other side there was a cross petition, insisting that no appeal lies but only from a definitive or final interlocutory decree having the force of a definitive sentence. *Lord Chancellor*—No objection has been made to the jurisdiction of the court of Chivalry, but only an appeal from the act of that court in their ordinary

9 June 1737, cor. Hardw. C.
Sir Henry Blount's Case,
1 *Atk.* 295.

jurisdiction; and therefore, as it is not insisted upon in Sir *Henry Blount's* petition, it must be thrown out of the case.

There are two questions, however:

1st, Whether an appeal will lie from any sentence of the court of Chivalry except a definitive one, or from such a sentence as the civilians call *gravamen irreparabile*?

2d, Whether this sentence of the court of Chivalry is *gravamen irreparabile*?

It was admitted by all that the court of Chivalry proceed according to the rules of the civil law, except in cases omitted, and there they are governed by the course and custom of chivalry and arms; but as no precedent was cited of such course and custom, it must be brought under the rules of the civil law with regard to appeals, so far as the same had been admitted in *England*. By the canon law, an appeal is admitted from all grievances in general; but by the civil law only, where *gravamen est irreparabile*. Lord *Hardwicke* then cited several instances from *Clark's Praxis Curia Admiraltatis Angliæ*, Cap. 50 & 51. to shew that this has been allowed in *England*. The rules laid down in that book, his lordship said, were extremely clear; that although the party propounds exceptions to witnesses, and the court of Admiralty reject them, yet there can be no appeal; for in the appeal from the definitive sentence the same exceptions may be propounded. This rule of the civil law, Lord Chancellor said, was founded upon very good reason, for else it would make causes in the court of Admiralty unnecessarily tedious, if appeals should be allowed upon every trifling or supposed grievance, which had great weight with his lordship; and upon search made in the court of Admiralty by both sides, there appeared no precedent of an appeal of this kind. Lord Chancellor then mentioned a case of *Grundel & al. v. Gavne and Co.* in 1706, in which the judge of the Admiralty Court had committed an error, which was *gravamen irreparabile*, and therefore was a different case; and another case of *Lord Coventry v. Gregory King*, which was in nature of a criminal prosecution for having, contrary to his oath and the duty of his office as *Lancaster* herald, caused the arms of his father to be impaled with false arms, &c. *King* gave a negative answer to the libel; but it being insisted on behalf of Lord *Coventry*, that *King's* answer should be on oath so far

far as he was obliged by law to answer, it was al-
 lodged by the defendant that the said libel
 contained criminal matter, and therefore Lord
Country's petition ought not by law to be ad-
 mitted, and prayed the same to be rejected; but
 the judge decreed that he should give his answer
 on oath to such of the articles as he was obliged by
 law to answer. Upon an appeal to the Delegates
 in 1702, they allowed the appeal from the inter-
 locutory order. Lord Chancellor observed that
 this cited case also widely differed from the prin-
 cipal case; for if *King* had made a confession on
 oath, the cause would have been over; and there-
 fore it was *gravamen irreparabile*, and could not be
 used as an authority for Sir *Henry Blount*. Then
 as to the question, Whether this decretal order be
gravamen irreparabile? Lord Chancellor observed,
 that by the laws of the college of arms all pedi-
 grees entered in their books must be signed by the
 parties, and all the ancient books are so, and it
 has been held that no pedigree is good in law with-
 out it; then Sir *H. Blount* goes on, and applies
 this to books produced in his cause. This was
 rather an allegation of a matter of law, and must
 be necessarily open even after a definitive sentence,
 nor will Sir *H. Blount* be precluded from any ad-
 vantage he can make of it before the delegates.
 All courts have a right to enquire of their officers
 what is the usual practice of their courts; and this
 is the constant method in *B. R.* and at *nisi prius*.
 The present case, Lord Chancellor said, was not
 near so strong as the instances put by Mr. *Clarke*
 in his *Praxis*, who was clear that in the instances
 he mentioned no appeal would lie. An objection
 was taken in argument that the Chancellor, upon
 a petition for an appeal, is not to try the merits of
 the case; that was admitted; but then the Chan-
 cellor must determine whether an appeal will lie
 or not, though he may not enter into the merits,
 or decide whether the judge of the court of Chi-
 valry has properly rejected the allegation. It was
 said there can be no great mischief if such a com-
 mission should issue out of Chancery; but Lord
 Chancellor objected to making a precedent for fu-
 ture applications, which might admit of dilatory
 appeals; because, as the court of Admiralty pro-
 ceeds by the same law, it would be an authority
 for such appeals from the interlocutory orders of

that court, and would create great expence and delay, and the suitors there are too necessitous for the most part to allow of any affected delay. For these reasons, Lord *H.* dismissed Sir *Hen. Blount's* petition.

GENERAL REFERENCES.

Children—see *Bastard*, *Parent* and *Child*, *Portions*, *Posthumous*.

Christian Court, or *Spiritual Court*—*Ecclesiastical Persons* and *Things*, *Jurisdiction*.

Circumvention—*Fraud*, *Deeds*.

Client—*Solicitor* and *Client*.

Choses en Action.

What is a Chose en Action, and how far the same can be assigned, released, or charged.

M. 1699, in *Scacc.*
Attorney-General v Woodon and another, Parker 267.

Vide Page's Case, 5 Co. 52.
39 Ed. 4. 6. *Toomes, Administrator, v. Heathington*, 1 Saund.
261. *Rath. Ent.* 605. 2 Roll.
Abr. 399. 8 Rep. 170. *Tourson's case*, 1 Inst. 118. *Mag. Char.* c. 30. 2 Inst. 58. 9 Ed. 3. c. 1.
14 Ed. 3. c. 2. 2 R. 3. 2. 1 Roll. Rep. 175. 3 Bulstr. 27. *Rex v. Williamson*, Freem. 39.

M. 1707, *Canc.*
Crouch v. Martin, 2 Vern. 595.

1717, cor. *Cowper, C.*
Amburst and others v. Selby,
11 Vin. Abr. 377. pl. 8.
2 Eq. Abr. 456. pl. 1.

1. *CHOSSES en action* belonging to an alien enemy are forfeited to the crown; but there must be a commitment and inquisition to entitle the king, and a peace before inquisition discharges the cause of forfeiture.

2. A *chose en action* is assignable in equity upon a consideration paid. A seaman assigns his wages as a security for money and dies indebted. This assignment specifically binds the wages, and the money secured thereby shall be paid in preference to all other debts.

3. *J.S.* by will devised the residuum to defendant *A.*, and to *E.* the wife of *B.*, and to *C.* the wife of *T.*, and made them three executors. The defendant

defendant *A.* only administered; and before all the estate of the testator was got in and his debts paid, *E.* the wife of *B.* died, and then *B.* her husband died. The question was, Whether the administrator of the husband was entitled to the third part of the residuum of the testator, or the administrator of *E.* the wife? *Per* Lord Chancellor—The residuum of the testator's estate was uncertain until his estate was got in and his debts paid, and thereby reduced to a certainty, before which it cannot be said to be actually vested, but remains as a *chose en action*, and therefore shall not go to the administrator of the husband, but to the administrator of the wife.

See the cases on this subject at large, ante, tit. Baron and Feme.

4. A man possessed of a *chose en action* in his own right may assign it without any consideration; but a baron possessed of a *chose en action* in right of his wife cannot assign it, unless for a valuable consideration, and yet he may release it.

T. 1733, cor. King, C.
Lord Carteret v. Paschal,
3 P. Wms. 199.
2 Eq. Abr. 89. pl. 15.
Affirmed in Dom. Proc. 4 Bro.
P. C. 168.

See more on this subject, tit. Baron and Feme, sec. 3.

5. Lord Chancellor in this case said, that *choses en action* and possibilities are assignable in equity if made upon consideration; but where there is a demand in equity under a trust, (which at the time of the release is a possibility only,) it must be supported by a consideration.

H. 1734, cor. Talb. C.
Rabinsun v. Bawajor,
3 Vin. Abr. 155. pl. 29.
2 Eq. Abr. 90. pl. 18.

6. Where the thing assigned is only a *chose en action*, though the assignment be without notice, yet as no legal estate passes *qui prior est in tempore potior est in jure*.

T. 1734, cor. Talb. C.
Tourville v. Naish,
3 P. Wms. 308.
Reg. Lib. B. 1733, fol. 461:
S. C. nomine Tourville v. Spelman.
Vide Brace v. Duke of Marlborough, 2 P. Wms. 496.

If there be two executors who are also residuary legatees, and one of them for a valuable consideration assigns part of his *residuum* to *A.*, and afterwards for a valuable consideration assigns his whole *residuum* to the other executor, if both are but *choses en action* the first assignment must take place.

7. A *chose en action* (as a bond) cannot pass by delivery in nature of a *donatio causa mortis* in regard it must be sued in the name of the executor.

T. 1735, cor. Jekyll, M. R.
Miller v. Miller and another,
3 P. Wms. 353.

8. Assignments of *choses en action* for a valuable consideration are good against creditors under a commission of bankruptcy.

22 Oct. 1746, cor. Hardw. C.
Brown, Assignee, v. Heatcote and another, 1 Atk. 160.
Vide Cock v. Goodfellow, 10 Mod. 495.

9. The provisions in 21 Jac. 1. c. 19. s. 11. with respect to legal interests, must be followed as to equitable ones; and as to *choses en action* equity ought

27 Jan. 1749, cor. Hardw. C.
& al.
Sir M. Ryall & al. Assignees, v. Rolle, Executor, 1 Atk. 183.

Note: A chose en action may be assigned without a deed, *Howell v. M'ivers*, 4 Term Rep. 690.

As to the assignment of choses en action, *vide* 4 T. Rep. 340. where Buller J. has fully commented on this subject.

As to the choses en action or possibilities of a feme covert, how far they shall be charged or reduced into the possession of the husband or survive to him, or how far they shall be preserved for the benefit of her or her representatives, *vide ante*, tit. Baron and Feme, et *vide post*, Possibility.

ought to follow the law: if not, infinite mischief would ensue. It is easy to turn a legal into an equitable interest; and if parliamentary provisions as to a legal interest were not to be followed as to equitable interests, it would defeat the act.

Colonies.

Of the Provincial Laws and Customs of the British Colonies, and of the Jurisdiction of the King and Council, and of the Court of Chancery, in Matters respecting them: And herein of Countries conquered by the King of England.

T. 1687, cor. Jeffries, C.
Noel v. Robinson,
3 Vern. 460. 469.

1. IT was said in this case by Lord Chancellor *Jeffries* (after taking time to consider the question) that the method of making a plantation in *Barbadoes* liable to a debt contracted in *England* was by a procuration from hence, under the seal of the mayor of *London*, and getting that recorded in *Barbadoes*, or an acknowledgment of the debt by the owner of the plantation upon the spot would do it. His lordship further said, that a plantation in *Barbadoes* was not a testamentary estate by the laws then in force.

H. 1717, cor. Cowper, C.
Ekins v. East India Company,
1 P. Wms. 395.
This decree was affirmed in *Dam. Proc.* 2 Bro. P. C. 72.
As to the allowance of India interest, *vide* *Boddam v. Ryley*,
2 Bro. Ch. Ca. 2.

2. A ship and cargo were wrongfully taken up in the *East Indies* by the defendants or their agents. This transaction having taken place in *India*, the interest of the country was allowed to the plaintiff in account; but in regard the money was payable in *England*, the charges of the return were deducted.

T. 1722, in Council.
Anon. 2 P. Wms. 75.
2 Eq. Abr. 221. 222. pl. 1. 2.

3. It was said *per M. R.* to have been determined by the Lords in council, on appeal to the king, 1st, That if *English* subjects discover a new and uninhabited country, (as the law is the birthright of every subject,) so they carry the laws with them,

them, and therefore such new discovered country is to be governed by the laws of *England*; though after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them; for which reason it has been determined that the statute of frauds and perjuries, which requires three witnesses to a will, and that they should subscribe in the testator's presence, in the case of a devise of lands, does not bind *Bur-
lades*: but, 2d, Where the King of *England* conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people, and in consequence he may impose what laws he pleases. Yet until such laws given by the conquering prince, the laws and customs of the conquered country shall remain, unless where they are contrary to our religion, or enact any thing that is *malum in se*, or are silent; in all which cases the laws of the conquering country shall prevail.

4. Upon a suggestion in this case that a sequestration had been awarded to the governor of *North Carolina*, Lord Chancellor doubted whether such sequestration should not be directed by the king in council, where alone an appeal lies from decrees in the plantations; and his lordship recommended in such case an application to the king in council.

5. Bill for delivery of possession of lands in *Saint Christopher's* and for an account of rents and profits. Defendant demurred; 1st, As to the jurisdiction of the court over lands in *Saint Christopher's*; 2dly, That plaintiff had not set forth a title to the rents and profits.

Lord Chancellor—The court has no jurisdiction so as to put persons into possession in a place where they have their own methods; on such occasions the present bill therefore would carry the jurisdiction of the court further than it has ever gone before (a). Lands in the plantations are no more under the jurisdiction of the court of Chancery than lands in *Scotland*, for it only *agit in personam*. As to the general equity the plaintiff as an infant has a right to an account of the rents and profits;

M 4

but

Vide Blankard v. Galdy, Salk. 411. *Vide* also Campbell v. Hall, Cowp. 204. Spragge v. Stone, Dougl. 38.

M. 1724, cor. Macclesfield, C. Sir John Fryer v. Bernard, 2 P. Wms. 262. Sel. Ca. in Ch. 5. *Vide* Lord Arglafe v. Muschamp, 1 Vern. 235.

16 Dec. 1738, cor. Hardw. C. Riberdeau v. Roux et Un. 1 Atk. 543, 544.

(a) *Vide* Angus v. Angus, in 1736, cor. Lord Hardwicke.

(a) *Vide Stribley v. Hawkie*,
3 Atk. 275.

but a demurrer to the jurisdiction of the court in this case is improper and informal, for that is in bar, and goes to the equity of the case. Defendant should have pleaded to the jurisdiction. The delivery of possession may be enforced in person, which was the old way. The writ of assistance, as by way of injunction, is of more modern date (a).

Plantations were originally members of England, and governed by the laws of England; and persons went out originally subject to the laws of England, unless in some regulations and customs which the plantations had a power of making. There have been instances of plantation-estates being sold in the court of Chancery, and consequently the court must have a power of enforcing a decree for a sale upon the person ordered to convey. Lord Chancellor mentioned the case of the Widow of *Pennsylvania v. Hamilton*, where there was an order upon *Hamilton* to deliver possession. Demurrer over-ruled as insufficient.

35 May 1750, cor. Hardw. C.
Penn v. Lord Baltimore,
1 Ves. 444.

6. The bill in this case was founded on articles executed in England, touching the boundaries of two British provinces in America, a specific performance of which articles was prayed by the bill: what else was in the cause came by way of argument to support, or objection to impeach, the relief prayed. Defendant objected; 1st, That the court of Chancery had not jurisdiction to make a decree in this case, for that the jurisdiction was in the king and council; 2dly, That if there was not an absolute defect of jurisdiction in equity, yet being a proprietary government and feudary seignior held of the crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries by their own act, for such an agreement to settle boundaries, and to convey in consequence amounted to an alienation, which these lords proprietors could not do; but supposing they may alien entirely, they could not alien a parcel, as that is dismembering, for which there is a rule in the feudal books concerning *feuda indivisibilia*; 3dly, The present agreement ought not to be carried into execution, as it affected the estates, rights, and privileges of the planters, tenants, and inhabitants within the district, and the tenure and law by which they live, without their consent:

the

the 4th objection was against the establishment of the agreement, from the general nature and circumstances of the agreement itself.

Lord Chancellor—First, as to the point of jurisdiction. The original jurisdiction in cases relating to boundaries between provinces, the dominion and proprietary government is in the king and council, and is rightly compared to the cases of the ancient *Commotes* and *Lordships Marches* in *Wales*, in which, if a dispute arises between private parties, it must be tried in the *commotes* or *lordships*; but in those disputes, when neither had jurisdiction over the other, it must be tried by the king and council, and the king is to judge, though he might be a party. This question, often arising between the crown and one lord proprietor of a province in *America*; so in the case of the *Marches* it must be determined in the king's courts, who is never considered as partial in such cases, it being the judgment of his judges in *B. R.* and in *Chancery*. So, where before the king and council the king is to judge, he is no more to be presumed partial in one case than in the other. The court of *Chancery*, therefore, has no original jurisdiction on the direct question of the original right of boundaries, nor does the present bill stand in need of that, being founded on articles executed in *England* under seal for mutual consideration, which gives jurisdiction to the king's courts both of law and equity, whatever be the subject matter. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the court originally will be brought within it. Suppose an order by the king and council in a cause, wherein the king and council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof, a bill must be brought in *Chancery* for a specific performance; and perhaps it will appear this is almost literally that case. The reason is, because none but a court of equity can decree that. The king in council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the king in council might allow that as evidence of the original right; but if that agreement is disputed, it is impossible for the king in council to decree it as an agreement. That court cannot decree *in personam*

personam in England, unless in certain criminal matters, being restrained therefrom by stat. 16 Car. and therefore the lords of council have properly remitted this matter to be determined in another place on the foot of the contract; for the king in council cannot decree an agreement as the court of Chancery can, which acts *in personam*; and further, as the court of Chancery collaterally, and in consequence of the agreement, judges concerning matters not originally in its jurisdiction, it would decree a performance of articles to perform a sentence in the ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant. As to the second objection, the subordinate proprietors may agree how they will hold their rights between themselves; and if a proper suit is before the king and council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. Herein also it is properly compared to the cases of *Lordship Marches* and to *Counties Palatine*. When the marches subsisted, there might be a suit in B. R. concerning their boundaries, and the lord of each *march* in question need be the only party. If a matter of equity arose as an agreement to settle boundaries, Chancery is the king's court of general jurisdiction as to matters of equity. It is not a true idea of alienation to say that such a settlement of boundaries amounts to an alienation; for if fairly made, the boundaries so settled are to be presumed the ancient limits. But if it should favour in some degree of an alienation, the act of 7 & 8 W. 3. c. 22. s. 16. supposes the proprietors may alien to natural born subjects. As to the not alienating a parcel, Lord Chancellor said, the rule cited out of the Feudists was not applicable; but he admitted neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted, and thereby bind the crown, of whom they held; for the tenure and services would still remain on the whole, and the crown might demand the whole service from either. Lord Chancellor compared it to the case of the office of *High Constable of England* held in *Grand Serjeantry*, which was very extraordinary to hold by tenure of such an office. In *Kel.* 170. and *Dy.* 285. the judges reported their opinion to king Hen.

Colonies.

C—D

3 Inst. 106. 149. 165.
Jenk. 236.

§ 8. that the tenure was not extinct by the division, but that the king had a right, at his pleasure, to insist on the performance of that office from the *Duke of Bucks* by reason of his moiety. But the settling limits is not dismembering; and if a licence to do this was necessary from the crown in law or policy, it sufficiently appears there was such by the orders of council in 1685 and 1709. As to the third objection, the tenure of the planters remains as before, and is preserved by the agreement in question. The king of *England* is still their sovereign and supreme lord; both charters require the law of the respective provinces should be conformable to the law of *England* as near as could be. This objection goes to the case of manors and honors in *England*, which frequently have different customs and bye-laws; yet though different, the boundaries of such manors may be settled between the lords without making the tenants parties to their suits, or by agreement between the lords without their tenants; but then the lords only will be bound, and not the tenants to their prejudice. In all events the manner of performing the agreement must come before the king's court of equity, whatever legal remedies may have existed for breach of proviso in the articles. The next objection is taken upon the general nature and circumstances of the agreement in question. Lord Chancellor said, it was true that the court never decrees specifically without a consideration; but settling boundaries for peace and quiet is a mutual consideration, and sufficient to support a suit for a specific performance of such an agreement; and as to the objection for lapse of time, it is the business of the court to relieve against that. It was contended that this agreement to settle boundaries was like an award to be performed by a certain day; but Lord Chancellor said it was an agreement which the court would see pursued. Fraud, imposition, surprize, or mistake, were urged in opposition to a decree for a specific performance; but Lord Chancellor said, no such appeared to prevent a decree. The defendant and his ancestors were conversant in the present dispute about 50 years before the agreement was entered into, and had all opportunities; therefore no ignorance, want of information, or mistake, could be presumed; and in cases of this kind, after an agreement

ment and plain mistake not shewn, it is not necessary to resort to the original rights of the parties; it is sufficient if doubtful. It was insisted that the defendant's charter included the whole 40th degree of north latitude. The former computations of latitude vary very much from the present; they were set much lower anciently. The plaintiffs say the king was deceived in his grant to the defendant; for that Lord *Baltimore* represented to the crown that such part of the land granted in his charter was uncultivated and possessed by barbarians, whereas plaintiffs contend it was possessed by the *Dutch* and *Swedes*, of which there was considerable evidence; and this was said to be no deceit on the crown; for that though some stragglers were settled there, yet if not recognized by the crown it is no settlement. But Lord *Hardwicke* was of a different opinion; for in these countries it has been always taken that, that *European* country which has first set up marks of possession has gained the right, though not formed into a regular colony, and that is very reasonable on the arguments on which they proceeded. If, therefore, the fact was so, that would be as great a deceit on the crown in notice of law as any other matter, arising from the information of the party, because such grants tend to involve the crown in wars and disputes with other nations, nor can there be a greater deceit than a misrepresentation tending to such consequences which would be a ground to repeal the letters patent by *sci. fa.* Lord Chancellor then considered the dispute on *Penn's* charter, and examined into the evidence of the geography of the country, the result of which was, (taking it in the most favourable light for the defendant,) that the boundaries of the countries and rights of the parties were doubtful, and the most proper case for an agreement, which being entered into, the parties could not resort back to the original rights between them; for if so, his lordship said, no agreement can stand; whereas an agreement entered into fairly and without surprise ought to be encouraged by a court of justice. An objection was made to the plaintiff's title to convey. Lord Chancellor said, the proof of the possession of the *Penns* was very clear; they have been permitted to appoint governors of the lower countries, which have been approved by the crown, according

according to the statute of King *William*. All acts of possession are with a *salvo jure* to the crown. Lord Chancellor thought full and actual possession was sufficient title to maintain a suit for settling boundaries; a strict title never is, or ought to be, entered into in cases of this kind. But no part of the lower countries is left to be conveyed by plaintiffs to defendant, so the point of want of title in plaintiffs to convey is ended. His lordship, however, decidedly said, that in cases of this kind of two great territories held of the crown, long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of titles to lands or districts of lands in *America*, that can be; for the great beneficial advantages arising to the crown from settling, &c. are, that the navigation and commerce of this country is thereby improved. Those persons, therefore, who make these settlements, ought to be protected in the possession as far as law and equity can; and both these proprietors appear to have great merit with regard to the crown and the public; for these two provinces have been improved in private families to the advantage of their mother country in a great degree. This regards the three lower countries, the strength of which is vastly on the side of the plaintiffs. As to the difficulty of enforcing the decree of the court of Chancery in the plantations, if it could not be done at all, it would be vain to make a decree. There are many cases where the court cannot enforce their own decree *in rem*, but that is not an objection against making a decree; for the strict primary decree of the court, as a court of equity, is *in personam*. Where, therefore, it is impossible to enforce a decree *in rem*, it must be done by process of contempt *in personam*, and sequestration when the party comes to *England*; and if in the present case the parties want more, they must resort to another jurisdiction. The point is now open as to that part of the case which relates to the crown. As Lord *H.* did not know how far the interest of the crown might extend in this case, his lordship reserved liberty for either party to apply, if by any act or right of the crown execution of the decree of the court should be obstructed; for the court has liberty to suspend its decree, if a difficulty to perform it be shewn; and his lordship reserved further directions as to that matter so *de novo* arising. Judgments have been at

law with a *salvo jure* of the crown, as in *Rafael and Coke's Entries*, in the title of *Intrusion and Warranto*, which, particularly in the case of lands relating to intrusion, is very analogous to the present.

Decreed a specific performance of the agreement without prejudice to any right of the crown.

The only remaining point was the costs, which Lord G. decreed the defendant to pay (though blameless) on account of the chicane and misbehaviour of his commissioners and agents in *America*.

30 Mar. 1750, cor. Hardw. C.
Stapleton v. Conway, 1 *Vef.* 427.

7. A sum of 2000 *l.* being charged by settlement on an estate in *Nevis*, the question was, What rate of interest it should bear? *Per Lord Chancellor*—There is no ground to direct *West India* interest. Where it has arisen by contract in *America*, by force of that contract, agreeable to the laws of those countries, the court has been obliged to follow it; but where it is a voluntary disposition by deed or will, and the court is to act according to its discretion, it has never given more than *English* interest, not even on mortgages made in *England* on *West India* estates, as that would be a method to evade the statute of usury. Where a contract is made in *England*, and the court is to act discretionally, it will only allow 5 *per cent.*

There have been instances where the court has allowed *West India* interest to a jointress on the arrears of her annuity after frequent demands made.

P. 1702, cor. Thurlow, C.
Cathcart v. Lewis,
3 *Bro. Ch. Ca.* 516.

8. Where a bill is to enforce a *Jamaica* judgment, it must shew the *legal effect* of the judgment in *Jamaica*, otherwise it is demurrable to.

Commission.

SEC. I. In what Cases and for what Purposes the Court will grant a Commission as a Matter of Right.

M. 1683, Canc.
Asen. 1 Vern. 187.

1. **WHERE** a man is to perfect his answer upon interrogatories, or to be examined for a contempt, although the rule of court be that he shall be examined in four days or stand committed, yet if the party be in the country he shall have a commission to take his examination.

For cases of commissions to examine witnesses,
Vide post. tit. Evidence.

Commission, &c.

C—o 175

1. The lord of a manor is entitled to a commission to ascertain the boundaries of his estate, in order to prevent a distress, where such boundaries are confounded by the tenants.

28 Mar. 1783, cor. Thurlow, C.
Bowrie v. Prentice, -
1 Bro. Ch. Ca. 200.
1 Eq. Abr. 75.

SEC. 2. In what Cases and for what Purposes the Court will grant a Commission as a Matter of Discretion or Favor.

1. A Commission of review is a matter in the discretion of the crown, and not a matter of right.

T. 1725, cor. King, C.
Franklin's Case, 2 P. Wms. 299.
Sel. Ca. in. Ch. 47.

2. A commission of review is not a matter of right, but of favor.

M. 1728, cor. King, C.
Hill v. White, Mof. 30.

SEC. 3. Of Commissions to ascertain the Boundaries or Value of landed Estates.

1. A. agreed with B. for the purchase of lands, and to pay so much *per acre* for the lands out of lease, and so much for the lands leased, after the rate of twenty-one years' purchase, according to the rentals. In order to ascertain the number of acres, defendant produced an old survey; and according to the number of acres in such survey, the purchase-money was paid. The conveyancer being willing to be fully satisfied in the number of acres, that he might insert the consideration-money right, sent to the defendant for this survey, and desired that he would sign it, which defendant did. It happened that in this old survey, in some closes there was a great deficiency of acres, in others a greater number than were expressed to be contained therein; but the last not making amends for the first, this bill was exhibited to refund what was paid over and above the number of acres. Decreed *per* Lord Chancellor, that a commission should issue to measure the lands out of lease, and the Master to see what additions or difference there was since the survey was taken, and what acres were in lease and what out, and the Master to adjust the number of acres.

T. 1708, cor. Cowper, C.
Sir Cloudesley Shovel v. Bogan,
2 Eq. Abr. 688. pl. 4.

Lord Chancellor said, Plaintiff goes upon the fraud, and makes that his equity. One man agrees with another to give to give him so much *per acre* for his land, and inquires of him how many acres he hath: if the vendor doth not inform him of the true quantity, it is a cheat; and no occasion for any express warranty in the deed of conveyance: the fraud is the equity. The vendee, in the least, does not apprehend but his account is right, and there is no intention in him to cheat. The signing of the survey is an averment of the quantity, and upon that averment plaintiff proceeds to a purchase. 1b.

2. Bill against land owners to establish a right of 40*l.* *per ann.*, and in lieu of tithes, which by a decree

P. 1726, in Scacc.
Cuthbert v. Westwood & al.
Gilb. Eq. Rep. 230.

decree in *Car. 1.* were to be paid out of particular lands (formerly part of the forest of *B.*) to the vicar of *C.* Decreed a commission to ascertain the value of the lands and the owners' names, and what proportion of the 40*s.* each tenement ought to pay.

P. 1728, in Scacc.
Sir John Rous v. Barker & al.
Bunb. 251.
Vide 3 *Mod.* 100. 1 *Sid.* 459.

M. 1732, cor. King, C.
Chopman v. Spencer,
2 *Eq. Abr.* 163. pl. 21.

M. 1732, in Scacc.
Bishop of Ely v. Kenrick,
Bunb. 312.

28 April 1744, cor. Hardw. C.
Norris v. Le Neve, 3 *Atk.* 83.

28 Mar. 1783, cor. Thurlow, C.
Bourne v. Prentice,
1 *Bro. Ch. Ca.* 200.
1 *Eq. Abr.* 75.

H. 1794, in Scacc.
Atkins Clerk v. Hatton Bart. & al.
2 *Anstr.* 386.
Vide *St. Luke's v. St. Leonards,*
1 *Bro. Ch. Ca.* 41.

M. 1797, in Scacc.
Woolaston & al. v. Wright & al.
3 *Anstr.* 801.
Vide *Atkins v. Hatton,* 2 *Anstr.*
386. *Johnson v. Atkinson,*
3 *Anstr.* 798.

3. The return of a commission to ascertain the lands of a manor ordered to be amended by the commissioners.

4. If a man claims lands in equity, but knows not the bounds, equity will grant a commission to ascertain them when the right is established; but if the right be not settled, the party will be left to his remedy at law.

5. Bill for a commission to set forth lands, the particulars of which plaintiff doth not know. Equity will not grant a commission if defendant denies he has any lands of plaintiff's in his possession; for that would be admitting plaintiff's title in general. If defendant had admitted plaintiff's title, and the dispute was only about particular lands, there a commission would be proper. In this case the title being denied, the bill was dismissed.

6. Though the interest of one party is more inconsiderable than that of another, yet they shall bear equally the expence of a commission for settling boundaries and separating freehold and copyhold.

7. If the tertenants of a manor confirmed the boundaries, the lord is entitled to a commission to ascertain them, in order to prevent a distress.

8. A commission to settle the boundaries of a parish, or of a manor, ought not to be granted, where all parties who may probably be interested are not before the court.

9. Bill to establish a *modus*, and that a neighbouring rector might interplead as to the tithes to be covered by such *modus*, and that a commission might issue to ascertain the boundaries of the lands within each rectory. The court refused this commission, for that two rectors claiming different things, one tithes in kind and the other a *modus*, could not be called upon to interplead.

SEC. 4. Of Commissions of Review, and the Cases in which the Lord Chancellor will advise the Crown to grant them.

1. A Second will is a revocation of the first, and after a probate of the first was confirmed by the delegates, a commission of review was granted.

T. 1712, Canc.
Annesley v. Palmer, 9 Mod. 3.

2. A commission of review was granted in this case, pending an indictment for forgery of the will in question.

T. 1715, cor. King, C.
Popping's Case, Sel. Ca. in Ch. 48.

On appeal new matter may be brought, but in review the party must proceed *ex eisdem actis*, unless there be a clause to receive new matter.

2 Eq. Abr. 32. (n.) to pl. 4.

3. A commission of review to reverse a sentence given by the court of delegates is a matter of discretion in the crown and not of right; and if it be a hard case as to bastardize issue, the chancellor will advise the crown to deny it.

T. 1725, cor. King, C.
Franklin's Case, 2 P. Wms. 299a
Sel. Ca. in Ch. 47.

Note: The right of granting commissions of review cannot be denied; they were not unfrequent in the last century, as appears by

the extract from the Registry of the Delegates, printed at the foot of this section.

4. A commission of review is not a matter of right, but of favor.

M. 1728, cor. King, C.
Hill v. White, Mos. 30.

Vide Franklin's Case, 2 P. Wms. 299. Sel. Ca. in Ch. 47.

If five judges are present, and two are against the sentence, this is no cause for a commission of review.

Vide Tindar v. Hopkins.

The prerogative, and court of delegates in England, gave sentence in favor of a will, and likewise the prerogative in Ireland, but the delegates in Ireland reversed that sentence five years after the sentence given by the delegates in England; both sides petition the king for a commission of review, and the Lord Chancellor declared, that he would advise his majesty to grant a commission to review the sentence in Ireland, but to suspend the consideration of the other petition till those commissioners of review had given sentence.

Vide 4 Inst. 341. 25 H. 8.
c. 19. Hardr. 216. ca. 7. Supplement to Wentw. 378.

Extract from the Registry of the Delegates, (which goes no farther back than 1666,) since which time twenty commissions of review have been granted, viz.

1666. To Elizabeth Lack, spinster, respecting the will of George Nicholson.

1670. To *Martha Goodson*, as a grant of administration of the goods of *Christopher Pole Stokes*.
 ——— *Henry James*, clerk, as to the will of ——— *Young*.
 1673. — *Thomas Milward*, in a cause of jactitation of marriage.
 1674. — *Henry Jackson*, clerk.
 1676. — *Henry Turberville*, as to the nuncupative will of *George Turberville*.
 1680. — *Philip Herbert*, clerk, in a cause of a legacy.
 ——— *Bridget Hide*, in a cause of nullity of marriage.
 1681. — *Christopher Boone* in a cause of inventory and account.
 ——— *Mary Ireton*, alias *Boslock*, as to the will of *H. W. Boslock*.
 1682. — *Catherine Gounter*, widow.
 1688. — *Thomas Payne* and *George Ude*, in a cause of revoking administration of the goods of *Thomas Mouton*, and granting probate of the will.
 ——— *Ann Metcalf*, in a cause of revoking administration of the goods of *Henry Maywood*, and granting probate of the will.
 ——— *Huberton Hicks* and *Martha Meggs*, the same of the goods of *John Slingleton*.
 1690. — *Humphrey Wigan* and *William Blount*, as to the will of *Jacob Pitt*.
 1692. — *Ann Short* and others, in a testamentary cause.
 1693. — *Francis Percy*, as to the will of *G. Du*.
 1694. — *Edward Passmore*, as to bringing in administration and granting probate of the will of *Thomas Jones*.
 1695. — *Granado Chester* and others, as to the will of *Philip Atkins*.
 1698. — *George Mason* and others, as to the will of *George Cook*.

In this century four have been granted, viz.

- In 1705. To *Francis Weedon*, as to the will of *Robert Weedon*.
 ——— *Robert Worth*, as to a will, but the name is not legible.

1733. To *Herbert Hyde*, as to the will of *Christopher Mason* against *Dr. Calamy* and *William Limbery*, executors.
1741. — *Sir George Savile*, Baronet, against *Dame Mary Savile*, in a cause of adultery.

In November 29 *Charles II.* upon an application for a commission of review of two several sentences of the court of Admiralty, and confirmed by the delegates, *Lord Nottingham* observed, as appears from a manuscript note of his lordship's, "It would be absurd and tend to a failure of justice to take from the king the *dernier* resort, and lodge it in the delegates. What were this but to exhaust the fountain of justice, and leave him without power, who gave power to others, as a fountain doth waters, cumulative, *non* privative."

SEC. 5. Of the Execution and Return of a Commission.

1. IN this case the court ordered the commissioners to amend their return of a commission to ascertain the boundaries of a manor.

P. 1728, Scacc.
Sir John Rous v. Barker,
Bunb. 251.
Vide 3 Mod. 100. 1 Sid. 259.

2. A plaintiff may serve any two of the defendant's commissioners with notice of the execution of the commission, and is not tied down to those only whom the defendant might chuse, otherwise if the two particular commissioners chosen by the defendant should be absent from the place appointed or either should be dead, the commission could not be executed, wherefore the court lets four commissioners stand on each side.

19 April 1747, cor. Hardw. C.
Anon. 3 Ark. 633.

3. A commission issued to four commissioners; two of them made one return and the other two made another quite different. Defendants took exceptions to both returns. Objected that the cause could not go on, for that the court could not prefer one return before the other.

T. 1787, cor. Thurlow, C.
Corbet v. Davenant,
2 Bro. Ch. Ca. 252.
1 Eq. Abr. 102.

Lord Chancellor refused to proceed, and ordered a new commission; but said the defendants should not have excepted to the returns, but moved to have them suppressed, and therefore ordered the deposit to be paid to the plaintiff.

T. 1795, cor. Lds. Comrs.
Bourdillon v. Alleyne,
 4 Bro. Ch. Ca. 100.

4. A commission had been executed abroad. The sending it out and receiving it back must be proved by affidavit.

Lord Commissioner Eyre said, that in the Exchequer, when a commission was executed abroad, the person who takes it out and returns it must make affidavit that he received it from the commissioners.

SEC. 6. Of the Commissioners, their Power and Duty: And herein of their Neglects and Defaults.

H. 1685, cor. Jeffries, C.
Bright v. Woodward,
 1 Vern. 369.

1. A Commissioner may be a witness; but he must be examined before any other witness in the cause.

H. 1726, cor. King, C.
Anon. 2 P. Wms. 126.
 The reporter says, *Quære* if the interrogatory had led to it? for it seems in the principal case it did not, it being the last general interrogatory.

2. A witness examined for the defendant deposed several very reflecting things, as that *A.* was a vexatious man, and a stirrer up of suits, &c. for which the witness was ordered to pay costs; but Lord Chancellor discharged that order, it being the fault of the commissioners to take down any deposition that was scandalous or impertinent.

Commission of Bankrupt—see Bankrupt.

———— of Lunacy—Lunatic.

———— to take an Answer—Answer.

———— to Examine Witnesses—Evidente.

———— upon the 43 Eliz. to inquire into Charities—Charity.

———— of Rebellion—Contempt—Writ.

———— of Delegates—Delegates.

Condition.

C—o

Rules respecting Conditions.

Conditions dispensed with or extinct in part are wholly gone. Hob. 313.

None but parties or privies may take advantage of a condition. Dr. and Stud. lib. 2. c. 20.

Condition to avoid a freehold cannot be pleaded without a deed. Secus of a chattel. Dr. and Stud. lib. 1. c. 8.

Conditions which go to the defeasance of estates must be taken strictly. Transf. Tenementum cum onere Gro. and Rud. of Law and Eq. 327—331.

Conditions precedent must be literally performed; not so of subsequent conditions, where the court can make compensation, for equity ought to relieve where the matter lieth in compensation. Gro. and Rud. 35, 36—96.

Equity will not vest an estate, where by reason of a condition precedent it will not vest at law; but of conditions subsequent, which are to divest an estate, it is otherwise. Gro. and Rud. 98.

It is sufficient if a condition be performed in substance.

A condition is only such as may be performed by the party himself, from whom it moves, or his heirs, and not where a thing is to be performed by a third person. Dict. per M. R. in Marks v. Marks, (Prec. in Ch. 488.); but per Lord Parker in S. C. (1 Stra. 134.) the very benefit and advantage of a condition is now passed over to a third person (notwithstanding the maxim that a stranger cannot take advantage of a condition) by words found out to save in appearance that maxim of the common law.

Conditions against law, and such as are repugnant or impossible are void. Lex non cogit ad impossibilia, 3 P. Wms. 626.

SEC. I. Of Conditions precedent.

1. IN this case Lord Chancellor said, that precedent conditions must be literally performed, and the court will never vest an estate where by

N 3

reason

M. 1682, cor. Nottingham, C.
Popham v. Bamfield, 1 Vern. 83.
Colles' P. C. 1—3, fully stated.

(a) *Vide* Ld. Feversham's Ca. cited.
 (b) *Vide* S. C. next section.

T. 1697, B. R.
Grafscot v. Warren, 12 Mod. 128.
 2 Eq. Abr. 361. pl. 5.

reason of a condition precedent it will not vest in law (a). *Secus*, of conditions subsequent which are to divest an estate (b).

2. A man possessed of a term devised it to an infant *en ventre sa mère*, if it should be a son; and if it should be a son, and die during his minority, then he devised it to his grandson; he then died, leaving his wife executrix. The child was afterwards born and proved a daughter. Adjudged upon a special verdict, without argument, that the executrix, and not the grandson, should have the term, because the grandson was not to have it but upon a *precedent contingency*, viz. the birth of a son, and his dying in his infancy; which condition must be first performed; and it appears plainly to be the intent of the testator, that he should not otherwise have it.

H. 1700, cor. Wright, C. S.
 M. R. affist.
Yates v. Phetplace,
 2 Freem. 243. 2 Vern. 416.
 2 Eq. Abr. 653. pl. 3.
Pres. in Cb. 140. S. C. nomine
Yate v. Phetplace.

3. J. S. having mortgaged his estate for a term of years, by will gave his daughter a portion of 4000*l.* to be paid her at 21 or marriage, if she married with her mother's consent, (otherwise but 1000*l.*) and he directed the mortgage term to be kept on foot for the better raising his legacies. The daughter dying at six years of age, her mother took out administration, and then married the plaintiff. Then the mother died, and appointed plaintiff executor to her will and sole devisee. Plaintiff contending that he was entitled to a moiety of the 4000*l.* given by J. S. to his daughter, filed his bill, but Lord Keeper held that the plaintiff had no title to it, because it was given *upon a contingency*, which *not happening in the lifetime of the daughter*, it never vested in her, and consequently could not go to her administrator, for she never married nor attained 21, which was a condition precedent, and not performed.

H. 1706, cor. Cowper, C. S.
Cragb & Ux. v. Wilson & al.
 2 Vern. 572.
 1 Eq. Abr. 111. pl. 5.

4. A. by will gave his grand-daughter 200*l.* on condition she continued with his executors till she was 21, but if she was taken from them by her father, who was a papist, before 21, or married against the consent of his executors, then he gave her but 10*l.* The daughter was placed by the executors with a clergyman, who before she was 21, with consent of one of the executors, permitted her to make a visit to her father, and he took that opportunity to marry her to a papist. Decreed

first at the Rolls, that the grand-daughter should have her legacy of 200*l.* with interest and costs. But on appeal to Lord *Cowper*, he declared the 200*l.* legacy was given upon a condition precedent, for the condition having described the quality of the person who was to take, was precedent in its nature; and although one of the executors consented that the grand-daughter might visit her father, he did not consent that the father should marry her; on the contrary, *that* was the very thing against which the testator intended to provide; and although there may be a difference between a condition that the grand-daughter should not marry without a consent, and where (as in this case) that she should not marry against the executors' consent (a), yet it is the same thing if the executors had not an opportunity before marriage to declare their dislike, for then it became a marriage against their consent, if upon notice they dissented and declared their dislike of the marriage. Lord *Cowper* reversed the decree made at the Rolls, and decreed that the grand-daughter was entitled to the 10*l.* only.

(a) *Vide Fleming v. Walgrave*,
1 Ch. Rep. 58.

Note; There does not appear in this case to have been any limitation over in case the grand-daughter married without the consent of the executors. *Quære*, therefore, if the testator's bequest may not be considered as in *terrorem* only?

Vide post, tit. Marriage.

5. An infant feme, having lands of inheritance, marries *A.*; articles are entered into, whereby she was during the coverture to settle and convey over these lands, and then she was to have a rent-charge of 450*l.* *per ann.* for her jointure, whereas before she had but 250*l.* *per ann.* *A.* dies; she marries *B.* *B.* and his wife bring a bill to have the 450*l.* *per ann.* *Sc. Harcourt*, Lord Keeper, decreed, that here was a condition precedent to her having her jointure augmented, which was to have been done during the coverture, and a court of equity will not relieve in such a case, where the omission of it was but a mere neglect in the party, (and cited *Lady Bertie's* case). But upon appeal, this matter was compromised by the lords; and Lord Keeper here dismissed the bill; for if he should relieve her, she would have both the lands and the 450*l.*

M. 1710, cor. *Harcourt*, C. S.
Wood v. Ingram,
2 *Eq. Abr.* 211. pl. 3.

6. In a marriage settlement, a power was lodged in trustees to raise 3000*l.* for a daughter, to be paid her at 21 or day of marriage, when *J. S.* and his wife should die without issue male; and in the mean time 100*l.* *per ann.* to be paid to her for maintenance. Resolved *per* Lord Chancellor *Cowper*, that the words, *when J. S. and his wife should*

P. 1715, cor. *Cowper*, C.
Champney v. Champney,
10 *Mod.* 314, 315.
2 *Eq. Abr.* 640. pl. 7.

Resolved on the authority of
the Duke of Southampton's case,
Show. 83. 2 *Freem.* 136.
1 *Vern.* 338.

die without issue male, amounted to a condition precedent, and that the time of raising the portion did not commence when one of them should be dead without issue male, and so the other be tenant in tail *after possibility of issue extinct*, but when both of them should be dead without issue male. Resolved also, that *the mean time* in which the 100 *l. per ann.* was payable for maintenance, must necessarily relate to the intermediate time between the raising the money, and her attaining 21, or marriage.

H. 1718, cor. Cowper, C.
Ann. 3 Vin. Abr. 450. pl. 4. 24.
2 Eq. Abr. 346. pl. 9.
323. pl. 22.

7. *A. devised to H. his wife all his debts, goods, &c. provided that if H. died without issue by him, he appointed that 80 *l.* should remain to his brother J.* *A. died, then J. died in the lifetime of H., and then H. died without issue by A.* First question, Whether this was a good devise to J.? Secondly, Whether he dying before the contingency happened, it was so vested in him that his executor should have it, or only intended as a personal benefit to J.? Cowper C. said, there is a difference between this devise, which is upon a condition precedent, and where it is upon a contingency over; as to one for life, and if he die without issue, or heirs of his body, then over to another. Here the wife has nothing in this money, but this is an appointment of so much money when the contingency happened. In the former case the estate tail *absorbs* the whole interest. The word (*remain*) is observable if such an accident happened; then so much was to remain to him; if this had been a devise over, there had been no question. May not this be construed, *if H. died without issue living by him?* This legacy was to arise upon a condition precedent, which makes the legacy the worse; but all the cases put are of a devise over, and the fund here is devised to the wife. As to the other point, if the devise be good, it must go to the executor of the devisee; but he said he would consider of it.

4 Mar. 1723, Dom. Proc.
Sweet v. Anderson,
2 Eq. Abr. 211. pl. 5.
3 Vin. Ab. 93. pl. 15.
13 Vin. Abr. 458. pl. 6. 19 Vin. Abr. 514. pl. 37. 2 Bro. P. C. 430.

8. Equity will not relieve against the breach of a condition precedent, where the damages accrued are contingent and cannot be estimated.

H. 1726, Canc.
Powell v. Pellet,
2 Eq. Abr. 209. pl. 3.

9. Defendant agreed by his note under hand to pay B. 200 *l.* within two years, and gave him a rick of wheat, on condition he married his daughter, and settled lands of the value of 600 *l.* upon her

her for her jointure. The marriage took effect, and there was issue a daughter, but both mother and daughter died before the two years expired. Plaintiff insisted it was an agreement proper for a court of equity to execute; and that he had married the defendant's daughter, and had been looking out for several purchases to lay out the 600*l.*, and was only prevented by the act of God. Defendant insisted it was a condition precedent, and to be wholly performed at all events before plaintiff could be entitled to the 200*l.*, and if any damages, he might have his action at law; that the plaintiff was not bound to lay out the 600*l.*, and therefore there were no *mutual remedies*. The court dismissed the bill, but without costs, for it was in plaintiff's power to have entitled himself to the 200*l.* when he pleased, by laying out the 600*l.*, which not being done, he is not entitled to any relief.

Rule—Remedies ought to be reciprocal.

10. Lands were devised in trust, to maintain the infant till 23, and then to account, and pay him the rents, and convey the estate to him; but if he died before, to convey it to another. Decreed, the infant is not entitled to an account till 23, for that is a condition precedent. The surplus profits, if he die before, go to the heir of the testator, not being devised over; but the infant and the heir, on suggestion of insolvency in the trustees, may bring a bill for an account.

M. 1729, cor. M. R.
Tilly v. Simpson, *Mod.* 244.



11. *J. S.*, in consideration of 500*l.* which he was to have with his wife in money and goods, and of the marriage, made a settlement before marriage, and thereby gave her a power to dispose of 200*l.* by will, which she accordingly did about 15 years after. On a bill by the legatees, *J. S.* insisted that he never received more than 300*l.* as a marriage portion with his wife; and that his having 500*l.* was a condition precedent. But the Master of the Rolls held otherwise; and that the *quantum* of the portion seemed rather a compensation than otherwise, and that it was not to be imagined but that the husband did look into such *quantum* before the marriage, and was satisfied therewith. Decreed the 200*l.* to be raised, with interest from the end of the year after the wife's death; and with costs; upon a presumption that the husband had received the 500*l.* portion.

T. 1731, cor. M. R.
North v. Aspell, 2 P. Wms. 612.
2 Eq. Abr. 209. pl. 5.

12. Testator

2 Dec. 1731, cor. M. R.
Sheriff v. Morlock, W. Kel. 24.
 2 Eq. Abr. 546. pl. 23.

(a) *Vide Garret & Ux. v. Pritty*
 & al. 2 Vern. 293.

(b) *Fry v. Porter*, 1 Mod. 300.
Lord Falkland v. Bertie, 2 Vern.
 335. 1 Roll. Abr. 418.

H. 1735, cor. Talbot, C.
Sir John Robinson v. Comyns,
Ca. temp. Talb. 164.
 2 Eq. Abr. 215. pl. 17.

30 Ap. 1737, cor. Jekyll, M. R.
Harvey & al. v. Aston,
 1 Atk. 376.

See a note at the end of this
 case by Mr. Sanders, in 3d edit.
 of Atk. on the subject of Con-
 ditions in restraint of marriage
 without consent; et vide etiam,
 post, tit. *Marriage*, where all the
 authorities on this point are col-
 lected.

P. 1779, cor. Thurlow, C.
Randall v. Payne,
 1 Bro. Ch. Ca. 55.
 1 Eq. Abr. 111.

P. 1786, cor. M. R. abf. C.
Randell v. Currier,
 2 Bro. Ch. Ca. 67.
 1 Eq. Abr. 107.

12. Testator devised a legacy of 500*l.* out of
 lands upon a condition precedent, which if not
 performed, the legacy was to sink into the estate
 for the benefit of the devisee of the land. The le-
 gatee not performing the condition, it was insisted
 that the testator's direction that the legacy should
 sink, amounted to a limitation over (a). But per
Jekyll M. R.—This being a devise out of lands,
 differs from personal legacies, and the legacy in this
 case is forfeited (b). Bill dismissed.

13. In this case Lord *Talbot* said, there are no
 technical words to distinguish conditions precedent
 and subsequent, but the same words may indiffer-
 ently make either, according to the intent of the
 person who creates it.

14. It is a known maxim, that where an estate is
 to arise upon a condition precedent, it cannot vest
 till that condition is performed; and this has been
 so strongly adhered to, that even where the condi-
 tion is become impossible, no estate or interest shall
 grow thereon. (*Co. Lib.* 206. a.) It is said, the
 civil law has no such distinction as that of a con-
 dition precedent. Though they have no such
 term, they have the thing in effect. *Conditio suspendit*
legatum is their rule, and they distinguish three sorts
 of legacies: 1st, A pure legacy; 2^{dly}, One payable
 at a future day, but certain; 3^{dly}, One payable on
 a condition that is uncertain in its event. As to
 the 1st, they say, *Dies legati venit*. As to the
 2^d, *Dies cedit, sed non venit*. And as to the 3^d,
Dies nec cedit, nec venit. In the last case, if the
 legatee die before the contingency happens, it shall
 not go to his executor. *Swinb. pt. 4. f. 12 & 13.*

15. Testator devised, subject to this contingency:
 If either of the devisees should marry into the
 families of *Rivington* or *Gosling* and have a son, I
 give all my estate to him for life, with remainders over;
 if not, to *Randal*. The devisees married, but not
 into the favored families. *Randal* filed his bill;
 but Lord Chancellor dismissed it, for the marriage
 is a condition precedent which the devisees have
 their whole lives to perform.

16. A. having an estate for life under the will
 of B. with remainder in tail to C., devised his
 own estate, together with the estate under the
 will,

§ 1. *Precedent.*

will, to trustees, to uses by which the tenant in tail would take only a life estate; but provided that his own estate should not be conveyed until the tenant in tail should suffer a recovery, and bar the remainders in the former will. *C.* did acts of ownership, and prepared for but never suffered a recovery, and died. *His Honor* held this not a case of election, but a condition precedent, which the tenant in tail not having performed, *A.*'s own estate never vested, and the estate of *B.* was not affected by it. It was argued that there was scarcely time to suffer a recovery, and that there was no neglect; but his Honor said there were many instances where the act is rendered impossible to be done, and yet the estate shall not vest; and he put this case: Suppose an estate given to *A.* on condition he shall enfeoff *B.*, *B.* refuses to accept, yet the estate shall not vest in *A.*

Vide also *Bertie and Lord Falkland*, 2 Vern. 333.

17. A legacy given to daughters "equally to be divided between them *when* they arrive at "24 years of age," is *vested immediately*, and the time of *payment* only is postponed. It is not a condition precedent upon which the legacy was to vest, as where the word "*if*" is used, but merely a postponing the payment.

23 Feb. 1792, cor. M. R.
May v. Wood, 3 Bro. Ch. Ca. 471.

As to the performance of strict conditions, see *post*, sect. 3.

As to relief against the breach of a condition, where the matter rests in compensation, see *post*, sect. 5.

As to conditions restraining marriages, unless with consent, where the breach of them shall cause a forfeiture, and where they shall be considered *in terrorem* only, see *post*, tit. *Marriage*.

SEC. 2. Of Conditions subsequent.

1. **ALTHOUGH** the court of Chancery will never vest an estate, where by reason of a condition precedent it will not vest in law (*a*), yet of conditions subsequent, which are to divest an estate, it is otherwise; and there is this difference to be observed, that the court cannot nor ought to relieve when it can in any case compensate the party in damages for the non precise performance of the condition; there it is just and equitable to relieve;

M. 1682, cor. Nottingham, C.

Popham v. Bampffield,

1 Vern. 83. and Colles' P. C. 1
to 8. fully stated.

(a) *Vide* S. C. last section.

relieve; but where the party cannot be compensated in damages, it would be against conscience to relieve (a).

(a) *Vide* S. C. sec. 5.

P. 1714, cor. Cowper, C.
Hunt v. Hunt & Ux. & al.
Prec. in Ch. 388.
2 Eq. Abr. 208.
Gib. Eq. Rep. 43.

Note; The rule in equity seems to be, that conditions precedent must be literally performed; not so of the subsequent conditions, where the court can make compensation. *Vide post*, sec. 5.

2. In a marriage settlement (by lease and release) was a proviso, that if the intended marriage did not take effect, and the intended wife should not when she came of age, by fine or otherwise, join in charging an estate to which she was then entitled with 2000*l.*, then the settlement was to be void. The marriage took effect; but the wife finding when she came of age that her own estate was of greater value than the jointure, she and her husband refused to join in charging it with the 2000*l.*, wherefore a bill was brought to have a re-conveyance. Lord Chancellor decreed a re-conveyance, and an account of the profits from the time of the refusal; but no costs on either side, for this was not a condition precedent but subsequent to the vesting of the estates in the defendant.

T. 1722, cor. Magdalenfield, C.
Aberley v. Vernon and another,
1 P. Wms. 783.

2 Eq. Abr. 209. pl. 2. 565. pl. 5.

The will and codicil of Mr. Vernon are more fully stated in 3 Bro. P. C. 107; but the appeal there reported was not in this cause, nor was this point at all litigated there.

3. A. gave a legacy of 6000*l.* to B. (the only child of C. his sister) payable at 21 or marriage, and died, leaving said C. his heir at law: but he devised the residue of his personal and all his real estate to trustees in trust, (the personal estate being first invested in land,) to settle the whole on D. for 99 years, if he should so long live, remainder to trustees during his life, to preserve, &c. remainder to his first, &c. sons successively in tail male; remainder over in like manner to E. The legacy to B. was to be in lieu and satisfaction of all she might claim out of his real or personal estate, and upon condition that she should release all her right thereto unto testator's executors and trustees in the will named. It was insisted that B. could plainly have no right during her mother's lifetime, who was the testator's heir; that she might marry while an infant, and so her legacy become due, and she not capable of releasing; or might intermarry with an infant, and so neither she nor her husband be capable of releasing, and yet the legacy due: wherefore, supposing it to be a condition, it could be no more than a condition subsequent (b), *Quod curia concessit*.

(b) This is a vested legacy, and B. shall have interest from testator's death, it being but on a condition subsequent. *Ibid*.

T. 1727, cor. M. R.
Nicholls v. Osburn, 2 P. Wms. 419.
2 Eq. Abr. 209. pl. 4.
565. pl. 14.

4. A. having a niece an infant about the age of 17, devised to her the surplus of his personal estates, payable at 21, and if she die before 21 or marriage,

marriage, the surplus to go over. Decreed the niece should have the interest paid her in the meantime, the devise over being a condition subsequent.

was determined in *Sheppard v. Ingram*, Ambl. 448. where a residue was bequeathed without mentioning any time of payment. *Vide also Shaw v. Curcliffe*, 4 Bro. Ch. Ca. 144.

5. The rule of law is *, that where there be a subsequent condition, which becomes impossible by the act of God, this excuses and discharges the grantee from the condition †, *lex non cogit ad impossibilia*; which construction ought rather to prevail in conditions so odious as those which restrain the freedom of marriage, and are void (a) by the civil law (b), when annexed to a personal (c) legacy.

* 1 Inst. 206.

† Rules.—Conditions against law, and such as are repugnant or impossible, are void. A condition dispensed with or extinct in part is wholly gone. Hob. 313.

(a) *Vide Clavering v. Sparling*, 3 P. Wms. 528. *Cray v. Willis*, 3 P. Wms. 531.

(b) The maxim of the civil law is, *Maritimum debet esse liberum*; and it is against the rule of that law that a devise over should amount to a forfeiture; but by our law, when once a legacy is vested in the devisee over, equity cannot fetch it back again.—Dict. per M. R. in *Clavering v. Sparling*.

(c) *Vide Bellasis v. Ermine*, 1 Ch. Ca. 22. *Fry v. Porter*, 1 Ch. Ca. 138. 1 Mod. 300. *Jervoise v. Duke*, 1 Vern. 19. *Stratton v. Grymes*, 2 Vern. 337. *Aston v. Aston*, 2 Vern. 452. *Creagh v. Wilton*, 2 Vern. 572. *Gillet v. Wray*, 1 P. Wms. 284. *Piggot v. Morris*, Sel. Ca. in Ch. 26. *Semphill v. Bayly*, Prec. in Ch. 562. *King v. Withers*, Gilb. 26. *Harvey v. Aston*, C. emp. Tab. 212. Com. Rep. 726. 1 Atk. 361. *Pullen v. Ready*, 1 Will. 21. *Underwood v. Morris*, 1 Atk. 184. *Daley v. Desbouvrie*, 2 Atk. 265. *Elton v. Elton*, 1 Will. 159. *Chauncey v. Graydon*, 1 Atk. 616. *Renish v. Martin*, 3 Atk. 330. *Wheeler v. Bingham*, 3 Atk. 364. 1 Will. 135. *Long v. Dennis*, 4 Burr. 2052. *Hemmings v. Munkley*, 1 Bro. Ch. Ca. 303. *Scot v. Tyler*, 2 Bro. Ch. Ca. 431. in which several other cases were cited.

6. In this case Lord Talbot said, there are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the person who creates it.

H. 1735, cor. Talbot, C.
Sir John Robinson v. Comyns,
Ca. temp. Talb. 164.
2 Eq. Abr. 215. pl. 11.

7. In the case of a condition subsequent, the thing is vested, and though in nature of a penalty, yet the intent should be clear and plain, by an express devise over to divest it (d); but in the case of a condition precedent, for which there can be no compensation, it would be giving an estate against the intent of the donor to dispense with the condition.

30 April 1727, cor. M. R.
Harvey v. Aston, 1 Atk. 378.
Vide S. C. at large, post, tit.
Marriage.

(d) Ever since the case of *Amos v. Horner*, 1 Eq. Abr. 112. a devise of the surplus of personal estate has been held to be a devise over.

8. It is the constant rule of law in conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void (e).

14 Jan. 1737 cor. Hardw. C.
Graydon v. Hicks, *Graydon v. Graydon*, 2 Atk. 18.
Vide Co. Litt. 206. *Peyton v. Bury*, 2 P. Wms. 626. *Jones v. Suffolk*, 1 Bro. Ch. Ca. 529. (e) *Harvey v. Aston*, 1 Atk. 301. and notes.

In

In what cases the court will give relief against a condition subsequent, the matter resting in compensation, see *post*, *sect.* 5. — And in what cases the court will dispense with a condition, see *post*, *sect.* 4.

SEC. 3. Of strict Conditions, and Conditional Limitations; who may take Advantage of them, and who may be prejudiced thereby.

H. 1687, cor. Jefferies, C. and I. the two Chief Justices assist.

Earl of Winchelsea v. Wentworth,
1 Vern. 401.

1 Eq. Abr. 104. pl. 1.

1 Vern. 430. S. C. nomine Earl of
Winchelsea v. Norcliffe.

LANDS were limited by settlement to the second son in fee, provided *that if the eldest son die without issue, the second son shall, within six months after his death, pay 15,000*l.* to a sister, or in default thereof, the land to go to the sister and her heirs.* The eldest son died without issue, and the sister died within six months. Decreed, upon the second son's refusing to pay the money, that the land should go to the heir, and not to the executor of the sister; for to decree otherwise would be to destroy the known difference (a) between a condition and a limitation.

(a) Words which create a condition are, *upon condition—so that—to the intent to pay—to the effect, &c.* Co. Litt. 204.

Hard. 10, 11. — But as to words which make a condition in a will, though not in a deed, *vide* 10 Co. 40, 41.; and there it is held, that if there be express words of condition annexed to the estate, it cannot be construed a limitation, as the words *quandiu, dummodo, dum, quousque, durante, &c.* But this opinion is now exploded; for although words which properly create a condition be used, yet if the estate be limited over, it shall be a limitation. 2 Brownl. 65, 66. 1 Rol. Abr. 412. 1 Mod. 86. And *per* Hale, C. B. there is no other case to warrant the contrary opinion, but that of 10 Co. 40. and by him it may be properly called a conditional limitation, (1 Vent. 109) of which the heir cannot take advantage, though it may determine the party's estate without entry or claim; which seems to be the chief difference between a condition and limitation. Also, if lands are devised to the heir at law, upon condition that he pay a sum of money, or do any other act; this, on failure of performance, shall be construed a limitation, though not mentioned: for if it were a condition, nobody could take advantage of it, the benefit of conditions annexed to real estates belonging to the heir; as those to personal do to the executor. Cro. Eliz. 204. 3 Co. 12. Ow. 112. 2 Mod. 7. 1 Lutw. 809.

5 Dec. 1692, Dom. Proc.
Sir Caesar Wood, alias Granmer, v.
Duke of Southampton, Administrator, &c. P. C. 83.
1 Vern. 338. 2 Freem. 186.

2. A bill was brought in Chancery in *M.* 1699 by respondent, who married the daughter and heir of Sir Henry Wood, as administrator to his late wife, for an account of her personal estate, *viz.* the profits of her real estate received by trustees in her lifetime. The case arose on the construction of a deed of settlement and will made by Sir H. W., in which deed (*int. al.*) it was recited, that a marriage was intended between respondent and his daughter, and then came a clause, that in case his daughter should live to attain 16, and should refuse to marry respondent, then the respondent should have

§ 3. *Strict, and who may take Advantage.*

have 20,000*l.* out of his personal estate. But if the said intended marriage should take effect *after his daughter attained 16*, and she should have issue male by respondent, then in trust for the respondent and his wife during their joint lives, with benefit of survivorship, and after the death of the survivor, to the first and other sons of the marriage in tail male, remainder to the daughters, remainder as Sir Henry should appoint, remainder to his right heirs in fee.

Sir Henry by his will confirmed the settlement, and directed that in case the said marriage should not take effect *according to the limitations of the settlement*, or in default of issue of the marriage, if the same should be had, then remainder to testator's daughter for life, if she should survive respondent, remainder to her eldest son, and after several mediate remainders, then to the appellant for life, remainder to *T. Webb, &c.*

Testator soon after died, and the marriage between his daughter and respondent took effect before she was 16; she lived, however, to attain 16, though she died before 17 *without issue*.

Upon the hearing of this cause in Chancery, it was insisted by the appellant, that by the deed of settlement to which the will referred, the personal estate *was not vested* so as to entitle the administrator of the wife *by reason of her marriage before 16*, and that it was Sir Henry's intent to restrain his daughter from marrying before that age; but *Nottingham C.* thought otherwise: he considered the thing aimed at by Sir Henry was a marriage between his daughter and the duke, and for that intent the penalty of 20,000*l.* was inserted in case of her refusal. The latter clause, his lordship said, was only to bring that 20,000*l.* again into the personal estate, and to be settled to the same uses with the rest, in case the marriage should be after 16; which did not imply that they might not marry before 16. Lord Chancellor therefore decreed an account, &c. but the Lords upon appeal reversed that decree.

3. This case was founded upon the preceding. The respondent was one of the co-heirs of Sir *H. W.*, and claimed a moiety of the profits of the premises for the duke's life, and the same was decreed accordingly. Decree affirmed by the Lords.

4. *Rice*

5 Dec. 1652, Dom. Proc.
Sir Caesar Wood, alias Cranmer, v.
T. Webb, &c. P. C. 87.

13 Jan. 1697, Dom. Proc.
Lloyd Bart. & al. v. Carew Bart.
 & al. Show P. C. 137.
 1 Com. Rep. 20.
 Prec. in Ch. 72.
Vin. Abr. tit. Fine, (Z), pl. 18.
Vide Fearn's Cont. Remain-
ders, 4th edit. 414. 1 Cruise on
Fines, 270. Smith and Warner,
Cro. Eliz. 688. Pell and Brown,
Cro. Jac. 591. Right v. Ham-
mond, 1 Stra. 429.

4. *Rice Tunot* esq. being seised in fee of divers lands, died, leaving issue *Mary, Penelope*, and *Susan* his daughters and co-heirs. By lease and release made in 1674, on the marriage of *Penelope* with *Sir Richard Carew*, in consideration of 4000*l.* paid by him to *Mary*, they, *Mary* and *Penelope*, conveyed two parts of the land to trustees, in trust for *Sir R. C.* for life, remainder to *Penelope* for life, remainder to the issue of their marriage, remainder to *Sir R. C.* and his heirs. *Proviso*, that if there should be no issue of the marriage living at the decease of the survivor of *Sir R. C.* and his lady, the said *Sir R. C.* and *Penelope*, and the heirs of *Penelope*, should, within 12 months after their decease without issue, pay to the heirs or assigns of *Sir R. C.* 4000*l.*, then the remainders and trusts for *Sir R. C.* and his heirs should cease and be void, and the fee simple of the estate be to the right heirs of *Penelope* for ever. *Mary* afterwards married *Sir Evan Lloyd*, and *Susan* to *Sidney Godolphin*.

Sir R. C. and his lady levied a fine of these lands to the use of *Sir R. C.* and his heirs, and then they both died without issue; whereupon the appellants filed their bill in Chancery against the surviving trustee and devisee of *Sir R. C.*, to have a conveyance of the estate to them and their heirs, on payment of 4000*l.* according to the proviso; but Lord *Somers* dismissed their bill, under a pretence that this proviso tended to a perpetuity. But the Lords, after hearing the judges, reversed the decree of dismissal, and afterwards it was added to the decretal order (a), that on payment of 4000*l.* to the devisee of *Sir R. C.*, the appellants, as heirs of *Penelope*, should be let into possession.

(a) Prec. in Ch. 106.

2 Mar. 1697, Dom. Proc.
Bertie & Ux. v. Lord Falkland
and another, Celler' P. C. 10.
 2 Vern. 333. Salk. 231.
 3 Ch. Ca. 129. 136.

5. The accounts of the fate of the appeal in this cause being so very contradictory, some reporters alleging that the decree in Chancery was reversed, others that the matter was ended by compromise, and some not speaking of any appeal at all, the compiler has here stated the case from the Lords' Journals, 16 vol. 230. 236, 237, 238. 240, 241.

Vide 1 Eq. Abr. 110. pl. 10.
 22 Mod. 183. Holt. 230.
Vide 3 P. Wms. 65. 4 Bro.
P. C. 194. 1 Atk. 361. 381.
 500. Com. 726. 3 A. k. 504.

The case was this—The appellant *Elizabeth* was daughter and heir of *George Lord Willoughby*, and niece and sole heir of *John Carey*. *Carey* took this young lady, being an infant and an orphan, and brought her up as his own; fearing, however, lest she might marry a papist, he contracted with Lord Guildford,

§ 3. *Strict, and who may take Advantage.*

C— 193

Guildford, a protestant, to marry her to his son; but both being infants, Carey sought to oblige his niece to marry the young lord, and therefore by his will he devised his estate to trustees for his niece (in case within three years after his death she married Lord G.) for her life, remainder to her sons by Lord G. in tail male, and in default of issue, or in case the said marriage should not take effect within the three years, remainder to Lord Falkland for life, remainder to his sons in tail male successively, remainders over; and testator appointed three executors. Ten days after by a codicil testator declared, that if such marriage took effect within the ages of consent*, it should be as none, unless afterwards ratified. Testator then committed the education of his niece to Lady Wiseman, Lord G.'s aunt, and died, leaving his niece about 12 years old, and Lord G. somewhat younger. Immediately upon testator's death his niece went to Lady W., and in December 1685, by her trustees, she filed a bill to have Lady W. appointed her guardian and for a maintenance, and Lady W. accepted the trust accordingly.

* i. e. the male at 14, and the female at 12, as said per Lord C. J. Treby.

On 26 December 1685 the appellant *Elizabeth*, in answer to a proposition of marriage sent her by Lord G.'s trustees, declared under her hand thus: "I will marry Lord G. as soon as ever he comes to his age of consent, or at any time before, by the advice of my friends and relations; and I do declare I will marry no other person whatsoever."

On 23 February 1685 the appellant *Elizabeth* filed another bill, stating her uncle's will, declaring her readiness to marry Lord G., and praying that the trusts of the will might in all things be performed.

In May 1686 Lady W. delivered up the appellant *Elizabeth* to the court, refusing to be any longer her guardian, and the court placed her under the care of her grandmother Mrs. Finnis.

In May 1687, just before Lord G.'s age of consent, *Elizabeth's* friends sent some proposals to Lord G.'s guardians for some maintenance for her out of her own estate till they should cohabit, Lord G. being young and about to travel, which proposals were rejected, and thereupon in July 1687 application was made to the court, when *Jeffries C.* declared such proposals reasonable, and that no person

person should persuade *Elizabeth* to marry unless they were complied with. Lord G.'s guardians acquiesced in the Chancellor's order, and never after renewed any address or application to *Elizabeth*.

In August 1687 Lord Chancellor sent *Elizabeth* to live with Lady *Hickman*, declaring that no marriage should be unless the former proposals were complied with. Under this order *Elizabeth* continued with Lady *H.* till the three years expired, within which time and for three years and a half after she did, towards effecting the marriage, all that honour and modesty would permit, yet neither Lord G. nor any of his relations took any notice of her; she therefore married the appellant *James Bertie*, a protestant of as honourable a family as Lord G.

None of the trustees interrupted Mrs. *Bertie's* possession until June 1694, when the respondent on his father's death brought ejectments against the appellants, who filed their bill in equity, and respondent by his guardians filed his cross bill.

Vds 2 Vern. 333. 3 Ch. Ca. 129.

Upon the hearing of this cause in Chancery, Lord C. J. Treby first delivered his opinion—he took the testator's will to be designed as a fixed and final settlement of the estate; and although *Elizabeth* was his niece and heir, yet Lord *Falkland*, though not so nearly related to him, was of his name and blood, and testator was likewise related to *Ld. Guildford* by marriage, though not in blood. He thought that *Elizabeth's* endeavours to bring about the marriage would not avail her, for the will was not formed upon the endeavour, but the event; and that she was to take nothing unless the marriage was actually had. Evidence was produced from the letters and sayings of the testator that it should not be in Lord *Guildford's* power to make *Elizabeth* forfeit her estate; but that, his lordship said, was inadmissible. In cases of a devise no regard could be had to parol declarations (a); it only tended to shew the necessity of the statute of frauds. The testator's will, his lordship said, was clear that his heir should not have his estate unless she married Lord *Guildford*, and the condition, which was

These causes were heard before the Lord Chancellor *Somers*, assisted by the two Chief Justices *Halt* and *Treby*. The appellant's bill was dismissed, and testator's estate was decreed to respondent and the heirs male of his body; which decree the appellants insisted ought to be reversed, and that the appellant *Elizabeth* and her issue ought not to lose the inheritance intended for them, merely because she in her infancy advised with her trustees, and paid obedience to the court of Chancery, and did not perform an impossibility; and further, that the distinction taken for the respondent between a devise upon a condition precedent and a condition subsequent, was a criticism which the testator could not rationally be supposed to have understood, and that here there was no reason for making such a distinction, for that *Elizabeth* was heir at law, and had a right to the profits within the three years (the debts and legacies being paid); nor could common sense warrant any such distinction, for that in plain honest meaning the conditions are the same, whether they precede or follow the grant, and only shew the parties' intention in what manner any particular thing should be complied with, as far as might be, and therefore insisted that the Lords should

(a) No papers, letters, &c. can be taken notice of to influence the construction of a will. 1 Salk. 135. 3 Ch. Rep. 94. 98. 1 Ves. 231. Dougl. 31. Bull. N. P. 297.

should order the trustees to convey the estate in question to the use of *Elizabeth* for life, remainder to her sons by *Bertie* in tail male, remainder over as in the will provided, in case she had married Lord G.

The respondent insisted it was immaterial by whom the marriage with Lord G. was prevented, for by the express proviso of the will, if the marriage did not take effect, the estate was to go over to Lord Falkland. And that no man can tell what will to make, or how to settle his estate by his last solemn act, if a will advisedly made, plain in expression and duly executed, should be subverted by surmise or construction contrary to the express declaration of the testator; and that in such case not only the present Lord Falkland but all devisees of estates would thereafter be precarious in the exposition of wills, be they never so plain or so fully expressed.

The Lords, after hearing counsel on both sides, adjourned the debate, and summoned all the judges to attend; when after again hearing counsel, a question was proposed, Whether the appellants should have any relief? which was resolved in the affirmative, (some Lords protesting). Then it was moved that Mrs. *Bertie* might enjoy the estate for life; and resolved, that that was the relief the House would give the appellants. Ordered therefore, that the trustees should execute conveyances whereby all the testator's estates should be assured to Mrs. *Bertie* for life, remainder to Lord Falkland and the heirs male of his body, remainder to the right heirs of testator for ever; and that there should not be any account of profits for the time past, and that testator's goods should go and remain according to his will; and that so much of the order of dismissal of the appellant's bill in equity, and of the decree on behalf of Lord Falkland, as was contrary to or inconsistent with this judgment of the Lords, be reversed.

statute of wills; for if a man's last will is sufficient to repeal all former wills, it ought to control all parol declarations. Lord Holt said, the condition in this case was plainly precedent. In cases of conditions subsequent, that are to defeat an estate, those are not favored in law; and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited, and a court of equity may relieve to prevent the divesting an estate, but cannot relieve to give an estate that never vested (b). The case of *Fry and Porter* (1 Mod. 300. 1 Eq. Abr. 332. pl. 9.) is much stronger and more proper for

precedent, not having been performed, the estate was gone over to Lord Falkland, and the trust of it vested in him. It remained, therefore, to see if equity could relieve, and in what manner?

18. Defendant Elizabeth cannot have the inheritance; for had she performed the condition she could have had but an estate for life, with remainder to her sons by Lord Guildford; and she cannot have a greater estate by not performing the condition. — It was contended for Elizabeth, that she had equitably performed the will by marrying a protestant equal in quality and estate to Lord Guildford, and that was a performance of the condition *ex parte*; for which was cited *Bamfield and Popham*, (Colles' P. C. 1) where the court relieved upon an equivalent; but Lord C. J. Treby said, it was not that the parties came to be relieved against a forfeiture, and that the testator intended the advancement of his niece, for the will was made in derogation of her right as heir at law; the testator does not enjoin his niece and Lord Guildford to marry, for he leaves them at liberty; but if she does not marry Lord Guildford, the estate goes from her to those of his name and blood; there was no latitude for the niece to marry any other man. It was not a case in compensation, nor was it capable of an equivalent to answer the testator's will, nor can equity relieve unless they can decree Mr. *Bertie* and Lord Falkland to be the same persons.

Lord Ch. J. Holt concurred, that the bill ought to be dismissed, and thought that all the parol proof, as to what the testator had declared or intended, was to be disallowed, and that the case must stand confined to the will (a). His lordship said, it would have been so before the statute of frauds, even upon the

(a) *Vide supra.*

(b) A lease for life, upon condition that if the lessee marry without licence the lessor may enter; held a good limitation. 1 Roll. Abr. 418.

for relief, the condition there being to be performed by an infant, who had no notice of the condition in the will. In *Earl of Montague v. Earl of Bath*, (2 Freem. 121.) the Duke of *Albemarle* had reserved a power of revocation in his settlement, yet having tied himself to strict terms, the court would not relieve, though by his will he solemnly expressed his intention and resolution to revoke, for the terms were not complied with; and if the owner of an estate is to be bound by the strict condition he has imposed upon himself, much more should those be bound who claim under him. Those to whom an estate is given upon condition must stand obliged to the performance of the condition upon which it is given. *Lord Holt* further observed, that had the condition become impossible, even by the act of God, as in case *Lord Guildford* had died within the three years, he thought the estate could never have arisen, much less was there any ground to relieve in the present case on the will. His lordship added, the testator's intention was express that his niece should not have the estate unless the marriage took effect, and his declaration by codicil put it beyond a doubt. Where the words of a will are doubtful or ambiguous, no strained construction ought to work the disinheritance of an heir who is favored in law; but where there is no doubt or ambiguity, the plea of heirship must not control a plain and express will. And his lordship said, it was as vain to talk of an equivalent: the marriage with *Mr. Bertie* (who was a stranger to testator) was no more an equivalent than it was a performance of the condition: it would be hard to maintain, that where an estate is given to a woman upon condition that she marry one man, she has performed that condition by marrying another. His lordship concluded by observing, that if it was a rule in equity that estates ought to go according to the will of the deceased, he must advise the dismissal of the bill; but if equity can alter wills, it may be proper to relieve the plaintiff in the cross cause.

Lord Chancellor Somers concurred with the two chief justices. The condition he said was plainly precedent, for by the will three years' profits after testator's death were to be applied to pay debts, so that nothing in the mean time descended or vested: there was no ground to maintain that this condition should be deemed subsequent, or to vest an estate, for there could not be stricter words to make a condition precedent. The testator's intention was plain, that his niece should take nothing as heir, unless there should be a failure of the issue male of the *Corys*; but if his niece married *Lord Guildford*, then she should be preferred before *Lord Falkland* and the rest of his name and blood, and not otherwise; for if his niece has married *Lord Guildford*, and had died without issue male by him, neither her daughters nor her sons by any after taken husband could have derived any estate under the will. As to its being a hard limitation, and the case of a trust, there was greater latitude (his lordship said) in equity to correct the rigor of a devise; but it were better that an estate should be carried from the heir by a hard disposition than that the courts should take upon them to vary the intention of a testator. As to the plea of infancy in this case, *Lord Chancellor* said, infants are always favored, and the king as *pater patriæ* has the care of them: they have divers privileges; but where an estate is given to an infant, upon a condition which he can perform, he must do it, and it was so held in *Fry v. Porter*. The case of *Popham and Bamfield* has no resemblance, for here is no equivalent: the nature of the present condition is not in point of value, but on a collateral act to be done: on the whole matter, *Lord Chancellor* said, *Mrs. Bertie* had no pretence to claim the fee in the lands in question; she ought not to profit by disobeying, nor to take a greater estate by not performing the condition than she could have done by performing it; nor can her claim of a like estate to her and her issue by *Mr. Bertie* be maintained, unless *Mr. Bertie* could become the *Lord Guildford*. Lastly, as the condition was the performance of a collateral act, and did not lie in compensation, *Lord Chancellor* could not see a just ground for a relief in equity, or to give *Mrs. Bertie* even an estate for life, unless the remainder-man had used any contrivance to prevent the marriage. *Lord Chancellor* dismissed the bill of *Mr. and Mrs. Bertie*, and directed the trustees to convey to *Lord Falkland*, &c. according to the trust. 2 Vern. 335—345.

As to that class of cases where devises are given upon condition to marry with consent, in what instances they are limited over and amount to a forfeiture, or where they are considered only in terrorem, vide post, tit. MARRIAGE, restraints on.

M. 1698, cor. Somers, C.
Husley v. Booth, 2 Vern. 359.
 1 Eq. Abr. 306, pl. 5.

6. A man having issue a son by the first venter, and two sons and six daughters by a second wife, settles his estate in question on his eldest son by his second wife in tail male, remainder to his second son by his second wife, and the heirs male of his body; and in default of such issue, to the son by the first wife: Provided if both his sons by the second wife died without issue male, so that the estate came to the eldest son, that then his eldest son or his heirs should, within four months after the estate came to him or them, pay 1000*l.* to his daughter

10111

§ 3. *Strict, and who may take Advantage.*

C—o 197

ters; or in default, the trustees therein named to enter and raise it. The son by the second wife entered and suffered a recovery of one moiety of the lands, and died without issue; and the other son by the second wife died also without issue, by which one moiety of the land came to the heir of the eldest son by the first wife. The moiety thus descended was decreed liable to the whole sum of 1000*l.*, although it was objected that the estate never came to the eldest son; and though a moiety came to his heirs, yet as so great a benefit did not accrue to him as was intended, he should be only answerable in proportion.

7. Legacies were given by a will to *A., B., C.,* and *D.*, upon condition that as they came to age they should release all claims to the testator's estate. This condition must be taken *distributively*, and such only as refuse to release shall forfeit their legacies.

H. 1704, cor. Wright, C. S. Haws v. Warner, 2 Vern. 478. 1 Eq. Abr. 106. pl. 4.

8. *J. S.* seized in fee of some lands in possession, and of others in reversion after the death of *A.*, and having a son and daughter, devised the lands in possession to his wife for life, and after her death and the death of the lessee for life of the other lands, he devised these respective premises to his son and his heirs, upon condition, *that the son should, within a year after the death of B., (after whose life it was said, but not proved,) that the testator had other lands in reversion (a), pay 1000 l. to the daughter of J. S., with a proviso that upon non-payment the daughter might enter.* *B.* died, and a year after her death the daughter marrying, brought a bill for sale of this reversion, in order to raise the 1000*l.* portion, and the interest from the end of the year of *B.*'s death. Master of the Rolls decreed the portion to be raised by sale, unless the son should pray it might be done by mortgage, which decree was confirmed by Lord Parker.

M. 1718, cor. Parker, C. on appeal from the Rolls. Bacon v. Clerk, 1 P. Wms. 478. Prec. in Ch. 500. 2 Eq. Abr. 208. pl. 1. 641. pl. 9.

Note; The report of th's case in *Prec. in Ch.* says nothing of the appeal to the *Ld. Chancellor.*

(a) A reversion is an estate, and a beneficial one too, and may, as well as any other estate, be devised on condition. 1 P. Wms. 479.

Vide Staniforth v. Staniforth, 2 Vern. 460. Corbet v. Maidwell, 2 Vern. 610. 657. Butler v. Duncomb, 2 Vern. 767. 1 P. Wms. 448. 10 Mod. 433. Reresby v. Newland, 2 P. Wms. 93. 2 Bro. P.C. 487. Broome v. Hebblethwaite v. Cartwright, Carter, 2 Atk. 354. Lyon v.

v. Berkeley, 2 P. Wms. 484. Evelyn v. Evelyn, 2 P. Wms. 659. Ca. temp. Talb. 31. Okeden v. Okeden, 1 Atk. 549. Hall v. Chandos, 3 Atk. 416.

9. *A.* had issue three sons: *B.* his eldest, who died in his lifetime, leaving a daughter, and *C.* and *D.* *A.* devised lands to his wife for life, and after her death to *D.* and his heirs, provided that if *C.* should within three months after the death of the wife

P. 1719, cor. Parker, C. M. R. assist. Marks v. Marks, Prec. in Ch. 486. 1 Eq. Abr. 106. pl. 6. 10 Mod. 419. 1 Stra. 139.

Vide Fearn's Cont. Remainders, 303. 317. 3d edit.

(a) At this day in devises and limitations of uses an estate may be limited over to a third person upon the defeasance of a former estate in fee, if the condition be not too remote in point of time; and though there have been words found out to save in appearance the maxims of the common law; yet in effect and in truth the very benefit and advantage of the condition is passed over to a third person, notwithstanding the maxim of law, that a stranger cannot take advantage of a condition (b). *Dict. per Lord Parker in S. C.*

(b) *Note*; In *Harvey v. Aston*, 1 Atk. 377. Lord Chief Justice Willes was of opinion, that if a stranger imposed a condition it was as strong as if a father had imposed it, and that the law was not founded on the consideration of the person giving, but on the thing given; the rule being *cujus est dare ejus est disponere*.

Vide *Spring v. Caesar*, 1 Jo. 389. *Winch.* 103. 116. 118. *Englefield's case*, 7 Co. 11. *Wood's case*, 1 Co. 99. *Shelly's case*, 1 Co. 94.

§ Mar. 1737, cor. M. R.
Whaley v. Cox,
2 Eq. Abr. 549. pl. 29.

Mich. 1737, cor. Hardw. C.
Hayward v. Stillingfleet,
1 Atk. 422.

wife pay to D. 500*l.*, then the land to remain to C. and his heirs. C. died in the lifetime of the wife. Decreed, that the heir of C. shall take advantage of this condition, and not the right heir of the testator (a).

and though there have been words found out to save in appearance the maxims of the common law; yet in effect and in truth the very benefit and advantage of the condition is passed over to a third person, notwithstanding the maxim of law, that a stranger cannot take advantage of a condition (b). *Dict. per Lord Parker in S. C.*

S. C. Lord Parker pronounced this decree on *Lit. sect.* 334, 5, 6, & 7. *Co. Lit.* 205, 6, & 7. and said, that though a condition was not in strictness of law deviseable, yet since the statute of uses the devisee may take benefit of it by an equitable construction of the statute, and that C. might have released or extinguished this condition.

10. None but the heir at law can take advantage of a condition.

11. *W. H.* by will gave 100*l.* to his daughter *Frances*, and 450*l.* between two other daughters; and then devised his land in trust for a term of 99 years, with a power to raise a less term upon trust, that if his wife should within four years pay off the 550*l.* then he gave the lands to her for life, and after her death to *W. H.* his son and his heirs male and female; and for want of such issue, to him and his heirs for ever. The wife did not pay the money; but the estate was afterwards sold under a decree of the court, and the 550*l.* was then paid off, and the residue applied according to that decree. Upon a bill by testator's grandson, as heir at law, for a reversion of the inheritance after 99 years' term, and for an account of timber cut down, &c. and for an assignment of the term against the devisee of the purchaser, no fine having been levied, and the purchaser having notice of the estate tail; it was insisted for the heir at law that this was not such a precedent condition with respect to the estate tail as must be performed by the tenant in tail before he could be entitled, but at most a charge only upon the estate; and that it was not pretended by the defendant that any fine was levied or recovery suffered, but only a covenant to levy a fine; and that no covenant by a tenant in

tail would bind the issue in tail. *Per Lord Chancellor*—The testator plainly declared his intention to dispose of his whole estate at all events, after which he gave 550*l.* to be paid out of his lands, and then appointed the manner of raising it, and said, if his wife should pay the 550*l.* within four years after his decease, then he gave her an estate for life out of the inheritance. If it be a condition, it is insisted it is annexed to the term for 99 years, and that testator intended to give his wife an estate in the term; but Lord Chancellor thought it could not be so construed contrary to the words, for though awkwardly expressed, the testator meant to carve an estate for life out of the inheritance, and not out of the term. His lordship said, the question here was, Whether the words of payment amounted to a condition or a limitation, and whether a condition precedent or subsequent? Lord Chancellor said, a condition subsequent could not be created; for the heir at law to whom an estate was after given, must be the person to enter and defeat the condition, because an estate of freehold cannot cease without an entry for a breach of the condition, and there has been no entry in this case. It would destroy the whole intention of the will, which could not at all serve the plaintiff. And his lordship said, it could not be a condition precedent, for if there is a breach, nobody can take advantage of it but the heir at law; a devisee cannot, and such a construction would defeat the estate tail (a). Wherever there is a limitation with remainders over made in the words of a condition, which would be construed as a condition if they could take effect, it ought to be construed as a limitation if they cannot. Lord Chancellor thought this was a conditional limitation in the wife taking place as an executory devise; for it could not be a contingent remainder, as that could never depend upon an estate for years, but must have a *freehold* to support it. And although this was an executory devise to the wife which never took effect, yet the estate tail to the son was well limited and took place (b). This being an executory devise, the freehold descended to the son as heir at law to the

(a) 1 Fearn's Cont. Remainders, 406. & seq. 4th edit.

(b) The principle, that a remainder over shall take effect notwithstanding the condition an-

nexed to the preceding estate, and on which the remainder is limited, should never arise or be performed, is recognized by many cases. *Scatterwood v. Edge*, Salk. 229. *Jones v. Westcomb*, 1 Eq. Abr. 245. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Andrews v. Fulham*, 2 Stra. 1092. 1 Ves. 421. 1 Will. 107. 3 Burr. 1624. *Guliver v. Wickett*, 1 Will. 105. 2 Stra. 1093. 1 Ves. 421. *Wig v. Wig*, 1 Atk. 382. *Fonnerreau v. Fonnerreau*, 3 Atk. 315. *Avelyn v. Ward*, 1 Ves. 420. *Bradford v. Foley*, Dougl. 67. *Statham v. Bell*, Cowp. 40. *Horton v. Whitaker*, 1 T. Rep. B. R. 346. *Doo v. Brabant*, 3 Bro. Ch. Ca. 393.

(a) *Sic* Pay's case, Cro. Eliz. 378. *Gore v. Gore*, 2 P. Wms. 28. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Wig v. Wig*, 1 Atk. 382. *Trevanion v. Vivian*, 2 Vef. 430. *Bullock v. Stones*, 2 Vef. 521. *Smith v. Newport*, 2 Atk. 344. 476.

4 Nov. 1738, cor. M. R. *Miles v. Leigh*, 1 Atk. 575.

(b) *Vide* *Marks v. Marks*, 1 Stra. 129. 1 Vef. 46.

2 July 1739, cor. Hardw. C. *Wig v. Wig*, 1 Atk. 382.

(c) *So* *Hills v. Whirley*, 2 Atk. 605. *Oke v. Heath*, 1 Vef. 135. 141.

(d) *Emes v. Hancock*, 2 Atk. 507. 509. *Sherman v. Collins*, 3 Atk. 322.

(e) *Shep. Touchst.* 131. 146.

(f) *Avelyn v. Ward*, 1 Vef. 423. *Hodgson v. Rawson*, ib. 47. *Sed vide* *Underwood v. Swain*, 1 Ch. Rep. 161.

testator, till the four years were elapsed, or his wife had performed the condition, as part of the inheritance undisposed of (a), and where an estate vests by descent, it can never divest again. Lord Chancellor said, a surrender of the term would not be proper, because it is not merely in nature of a security, but an absolute power in the trustees to sell the estate for raising the daughters' portions. His lordship further thought the son had a good estate tail in the inheritance expectant on the determination of the 99 years, and decreed a perpetual injunction to stay waste, and the title deeds of the plaintiff's inheritance to be secured for his benefit. No costs on either side.

12. A condition will bind the heir, if the devise so takes effect as that he must claim under the ancestor, as much as if the ancestor himself had taken in possession (b).

13. *C. W.* devised lands to his second son *Thomas*, upon condition that *Thomas* or his heirs should pay to *C. W.*'s grandchildren (the children of the said *Thomas*) 90*l.*, to be equally divided among them; and on default of payment a clause of entry and distress. *Thomas* died in the testator's lifetime: the son of the eldest son of the testator entered on the lands as heir at law, and sold them. Held the legacy to the children of *Thomas* the testator's second son was a continuing charge on the lands in the hands of the purchaser; and that they were entitled to be satisfied for the same with interest (c).

Defendants insisted that the condition in this case was only annexed to the estate of *Thomas*, and that as his estate did not take effect, it was void. But Lord Chancellor said, this was not a mere condition but a conditional limitation, there being an express limitation over to the legatees in case of non-payment, who were to enter and hold in nature of tenants by *elegit* (d); and there are many nice distinctions on these conditions arising by wills.

A. devises lands to *B.* on condition to pay *G.* a sum of money, and no clause of entry on default of payment. The legatee at law has no lien on the lands; but the heir of testator shall enter and take advantage of the breach of the condition (e); and yet in equity the heir shall be considered only as a trustee for the legatee (f).

§ 3. *Strict, and who may take Advantage.*

C—o 201

A man by will may make an equitable as well as a legal charge on his estate; and equity will maintain it against *the heir at law*,

14. *A.* gave his wife the whole surplus of his estate; but if she married again, then she was to deliver up half to his brother and his heirs. Upon a bill brought to discover whether she was married again, she demurred to the discovery, as it would subject her to a forfeiture. Lord Chancellor—This being a conditional limitation over an estate, she must shew she has performed the condition. Demurrer was over-ruled.

6 Aug. 1745, cor. Hardw. C.
Lucas v. Evans, 3 Atk. 260.
Vide Chancy v. Fenhoulet,
2 Ves. 265. Boteler v. Allington, 3 Atk. 457.

15. Testator in 1738 gave a legacy, payable out of his real estate 12 months after the death of *A.*, and he charged his lands therewith accordingly. After testator's death *A.* entered and possessed the real estate and died in 1744. The legatee survived *A.* one month, and his executors brought their bill for the legacy against the devisee of the real estate, who was not testator's heir at law. *Per Lord Chancellor*—As a condition or contingent legacy, the executors may have the benefit of it (*a*) agreeable to the rules of law in cases of heirs, where the heir, though not named, may take advantage of a condition annexed to a real estate. In *Marks v. Marks* (*b*) there was a condition to gain an estate on payment of money in a limited time: the party died before the time, and his heir was relieved (*c*). Thus it stands at law with respect to the plaintiff. With respect to the defendant, it was a devise on a condition of paying; for the devisee not being heir at law, but a stranger, it was a direct condition, not a conditional limitation (*d*). Here is a devise to a stranger, and a condition of which testator's heir at law must take advantage. He may bring an ejectment against the devisee for a breach in not paying, since at law the benefit of the contingency is transmissible. Then the testator having expressly created a charge on the land, it will bind the land in the hands of the heir, after his recovering in ejectment. Then as to the alterations in equity, the rule is, that a legatee dying before the legacy is demandable, it shall sink into the estate; but here being a plain right at law, and the land recoverable for non-payment, it would be strange to deprive the legatee of it, and repugnant that the devisee should lose his

6 Nov. 1747, cor. Hardw. C.
Hodgson v. Rawson, 1 Ves. 44. 46.

(*a*) *Vide* Anon. 1 Salk. 170.

(*b*) *Stra.* 129. 1 Eq. Abr. 106. pl. 6. 10 Mod. 419. *Precedent* in Ch. 486.

(*c*) 2 Vent. 347. cited in King and Withers, *Forrest*. 123. was decreed on same ground that a contingent interest is transmissible to the representative.

(*d*) *Willcock v. Hammond*, cited in *Boraston's case*, 3 Co. 19. was not like this; for that was a conditional limitation.

(a) *Vide* Pawlet v. Pawlet, 2 Vent. 366. 1 Vern. 204. as to the distinction in personal legacies, whether at the day or payable at the day.

(b) *Vide* Lowther v. Condon. 2 Atk. 127.

(c) So decreed in Wilson v. Spencer, 3 P. Wms. 172.

19 Mar. 1749, cor. Hardw. C. *Avelyn v. Ward*, 1 Ves. 420.

his land for *non* payment, and yet the legacy itself is lost (a). The testator must in this case have had in view the legatee's dying in the life of A., having expressed it afterwards, where he intended it should defeat the legacy, which not having done here, it is an evidence of his not intending it, and it is admitted by the defendant that there are cases where the intent will control the general rule (b). Decreed the legacy in question to be raised and paid with interest at 4 *per cent.* from a year after the death of A., and the plaintiff to have his costs (c).

16. A. devised his real estate to his brother B. and his heirs, on this express condition, that within three months after his decease he should execute and deliver to his trustee, in full words, a general release of all demands which he could claim on his estate. But if his brother should neglect to give such release, the said devise to him should be null and void; and in such case he devised it to C. his heirs and assigns for ever. A. gave some legacies to his sister; and at the end of his will there was a clause, that what was given to B. and his sister should be taken in full satisfaction of all claims, which they or either of them could make on his real and personal estate; and upon this express condition, that the sister, her husband, and B. should, within three months after his decease, execute a general release to his trustee or representative. B. the first devisee on this condition, who was testator's heir at law, died in his lifetime. *Per Lord Chancellor*—The question is, Whether this devise over, and the contingency upon which it is given, is to be considered as a strict condition or a conditional limitation? If the former, it would be difficult to maintain that the second devisee could have the estate but upon a strict breach. If the condition had been performed or had become impossible by the act of God, that cannot be; but if it be a conditional limitation, the consideration is different; and his lordship said, he knew no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place; and his lordship thought

§ 3. *Strict, and who may take Advantage.*

thought this must be so construed. If it be a condition strictly, it is subsequent, because the estate would vest in *B.*, and to be defeated by what might happen afterwards. But that is not the construction in this case, and never is; for if there is a devise to a stranger, not the heir at law, upon a condition subsequent, the devisee over cannot take advantage of the breach, for the benefit thereof is not in the devisee, but must go in privity to the heir at law of the grantor, who must enter for the breach, not the devisee, though in some cases perhaps the court might make the heir a trustee for the devisee. Therefore, according to *Co. Lit.* 206. where an estate is devised, paying a sum of money, and if not paid over to another it is a conditional limitation to effeuate the devise, and not a condition. But this case is stronger, because the devise is to the heir at law; who being the only person to take the advantage, and if he survives the testator, must be supposed to be in possession by the devise, must enter on himself. This, therefore, must be construed a conditional limitation, and it ought to take effect notwithstanding the words, *that if he gave not such release it should be null, &c.* If it is to be construed as a strict condition, What is insisted on for the plaintiff? that there must be a strict breach or forfeiture in fact agreeable to the words, to make the subsequent estate take effect, and that would be the rule: but as it is a conditional limitation, it comes to the question, Whether it is necessary every particular fact should take place? or, Whether it is not to be construed according to the sense and intent of the testator? that if in any event the first cannot take place, the subsequent should; if so, the substance of this was the intent of the testator, that if no such release was executed, whereby the demand against his estate would exist, the estate should go over. *Lord Chancellor* said, that *Jones v. Westcombe*, cor. *Harcourt C.* (a) was in point, as well as the two cases in *B. R.* (b), but more strongly the latter. Therefore *contra* the opinion of the court of *C. B.* in *Roe v. Wickett* (c), and agreeing with his lordship's own resolutions in *Fonnereau v. Fonnereau* (d). *Lord Harcourt* decreed that the land should not descend to the heir at law, but go to the devisee over, it not being a strict condition, but a conditional limitation.

17. Testator

(a) *Prec. in Ch.* 316. 1 *Eq. Abr.* 245. pl. 10. *Gilb. Eq. Rep.* 74.

(b) *Andrews v. Fulham*, 2 *Str.* 1002. & *Gut'v' v. Wickett*, 1 *Will.* 16.

(c) Cited 1 *Will.* 107. 3 *Eurr.* 1624. 1 *Ves* 421.

(d) 1 *Ves* 118.

10 May 1754, cor. Hardw. C.
Embry v. Martin, *Amb.* 231.
 1 *Eq. Abr.* 107.

17. Testator devised "to his son *A.* in tail, remainder to his daughter *B.* in tail, remainder to his daughter *C.* in tail, remainder to her son *D.* and his heirs, on condition that he pay to his elder sister, plaintiff's mother, 100*l.* at or soon after his being possessed of the estates, and for non-payment the estate should be to plaintiff's mother, &c." *A.*, *B.*, and *C.*, and plaintiff's mother being all dead, and *D.* seized in possession of the remainder in fee, plaintiff, as executor of his mother, filed his bill to have the 100*l.* raised. —Lord Chancellor said, this was a very plain case. 1st, It could not be intended as a mere personal legacy to plaintiff's mother, for it was not likely she should live till the remainder vested in *D.*, which would be after two estates tail. In many cases money has been directed to be raised where it was likely the legatee would die before the event happened. 2dly, It is a conditional limitation, and there is a legal remedy for raising the money. It is a condition subsequent, as all conditions turned into limitations are. It is to be raised after *D.* comes into possession. The only doubt is from the devise over being limited to the mother without saying *her executors*. It is agreeable to law that it should extend to her executors, and testator was writing what would be law, but he left off with an *et cetera*.

24 Feb. 1797, cor. M. R.
Holmes v. Cradock,
 3 *Ves. jun.* 320.

18. It has been determined that conditional limitations shall never be extended beyond what is absolutely necessary from the context of a will, and shall not be supposed to govern any disposition except that upon which they may naturally be supposed to attach. Therefore, if a testator says in his will, that if his wife shall be enstient at his death, and a son shall be born, he gives it to that son, and after his death over, the condition has been construed only introductory of the gift to that son if born, and not to govern the limitation over.

As to the breach of a condition precedent or subsequent, see *post*, sec. 5.

As to the nature of the contingency, on which a remainder may be limited, see *Executory Devise—Limitation—Remainder*.

SEC. 4. In what Cases the Court will require the Performance of a Condition, either expressly or *Cy pres*—What Circumstances will induce the Court to dispense with a Condition, and what is such a Performance of a Condition as will protect against a Forfeiture.

1. A man devised to each of his daughters 20,000*l.* payable at 25; but if either of them married before 16, or if the marriage was without the consent of their mother and trustees, then they should lose 10,000*l.* of the portion, which should go to his other children. One of them married before 16; and, although it was with the consent of all the parties, yet the court held that both the terms of the condition ought to have been observed.

P. 1691, cor. Lds. Comrs.
Ld. Salisbury's case, 2 *Vent.* 365.
3 *Ch. Ca.* 135.
1 *Eq. Abr.* 109. pl. 9. 2 *Vern.* 223. *S. C. nomine Salisbury v. Bennet*, where it is said the father treated with Lord S. about the marriage, though he died before it was had; and there the decree is quite contrary; for it was held the daughter should have the whole 20,000*l.*; and this last resolution agrees with *Skin. Rep.* 285.

2. Testator Henry Rogers in May 1672 devised his estate to Warwick Bampffield esquire and others, for payment of his debts, and devised the surplus of his estate* to Alexander Popham for life, remainder to all his sons in tail male, upon this express condition, that if Alexander should die without issue male, or, if Sir Francis (Alexander's father) should not in his lifetime settle two parts in three of the estate which was settled on Sir Francis in marriage on said Alexander and his heirs male, then in default of such settlement testator devised part of his estate to Warwick Bampffield and his heirs, and the residue to others, all as near of kin to testator as Alexander was. And though no such settlement executed, though requested and sued in Chancery to do so, yet Alexander after his father's death brought a bill in Chancery (a) to be decreed the estate devised, and for an account of the profits, suggesting that his father had settled an equivalent on him; and on the hearing of that cause, the court decreed an inquiry by the Master, whether such equivalent was settled or not, and further directed the trustees to account with Alexander for the profits (b).

18 Jan. 1697, Dom. Proc.
Bampffield's Trustees v. Popham,
Esq. Colles' P. C. 1 to 8.

* It appears by Mr. Vernon's report of this case, that Mr. Rogers' estate was of the annual value of 1500*l.*

This will is stated more at large in *Colles' P. C.* 4, 5.

(a) 13 Nov. 1682, *S. C.* reported 1 *Vern.* 79.

(b) Mr. Vernon, in his report of this case, says, that Sir Francis made a settlement of his estate with power of revocation, and that the trustees exhibited a bill against Sir Francis to compel him to make a settlement according to Mr. Rogers' will, which Sir Francis submitted by his answer

to Popham in his lifetime, in order to entitle his son to Mr. Rogers' devise, made a settlement of his estate with power of revocation, and that the trustees exhibited a bill against Sir Francis to compel him to make a settlement according to Mr. Rogers' will, which Sir Francis submitted by his answer

answer to do in such manner as the court should direct; but before any thing further was done in the cause Sir Francis died, having by will devised all his lands, being 6000*l.* per ann. charged only with debts to the amount of 30,000*l.* to his son Alexander for life, remainder to his first, &c. son in tail.—It was objected in the cause, that Alexander was by his father's will made tenant for life only, whereas by the condition he was to have had a greater estate; but Lord Chancellor conceived that was well enough, and better answered Mr. Rogers' intent than if the condition had been literally performed; and his lordship declared, that if the substance of the condition in this case was performed, it would be sufficient; but as to the quantity of the estate left to Alexander by his father, if that should prove deficient in value, it might make a new case; and therefore his lordship ordered the Master to examine into the value of the estate devised, and the amount of the debts charged thereon, and to report whether there would remain to Alexander full two-thirds of the estate settled on Sir Francis in marriage. 1 Vern. 79, 80. 83.

* This case was different from the ordinary proceedings of appeals in parliament, for it was a petition to the Lords for leave to proceed on a bill of review and revival brought by the petitioners against Lord Chancellor's decree.

(c) In M. 1685, it appears an application was made to the court, for Lord Chancellor said, "*The parliament being prorogued, you may proceed in the account, notwithstanding the appeal.*" Vide 1 Vern. 344.

In 1685 *Bampfild* appealed to the Lords from Lord *Nottingham's* decree* in 1682, complaining that such account was decreed to *Popham* before it appeared that such an equivalent was settled. *Popham* answered this appeal. Parliament was then prorogued, and no other parliament was held till 1689, notwithstanding which (c) the Master on 1st July 1686 made his report, that the devise of Sir Francis to Alexander (though he only made him tenant for life) was an equivalent. The Master's report was excepted to, but on 7th December 1686 was confirmed, and on 29th February 1687, on *Bampfild's* petition, stating that the manner and quality of the settlement was not certified by the Master, pursuant to an order of the 3d July 1683, the court discharged that order.

The cause upon the appeal was heard 1st July 1689, and the appeal was dismissed notwithstanding the Master's report, and that the subsequent proceedings in Chancery could not be in judgment before the Lords on that appeal, yet *Popham* insisted that the petitioners were concluded from controverting the supposed equivalent, or examining into the particulars thereof.

On 18th July 1693 *Bampfild* filed a bill in Chancery to review and reverse the proceedings had in that court subsequent to the appeal, and assigned divers errors, and *Popham* on 29th July 1693 obtained an order to dismiss the bill of review with exemplary costs, unless cause in *Michaelmas* term following, suggesting that the matters assigned for error had been settled by the Lords; and on 27th October 1693, on *Bampfild* shewing cause against that order, it fully appeared that the errors so assigned never had or could be in judgment before the Lords. Yet

In December 1693 *Popham* petitioned the Lords, suggesting that Chancery had proceeded to examine and reverse a decree settled by the Lords, and would thereby draw their lordships into examination in

in Chancery, whereupon a committee was appointed to consider of the cause and proceedings, and report what was fit to be done; and on 3d January 1693 the committee reported that there did not appear any proceedings in Chancery on the matters determined by the Lords, to which report the Lords agreed. *Popham* then pleaded these proceedings, and *Bampfild* replied, and then *Bampfild* died, having previously conveyed his estate to petitioners the trustees, first, for payment of his debts and legacies, and afterwards for petitioner Sir C. W. *Bampfild* and his issue male, remainder to petitioner J. *Bampfild* and his issue male, and by his will confirmed such settlement.

In P. 1695 petitioners exhibited a bill to review and revive these proceedings. *Popham* answered, and examined witnesses to prove that the report and matters subsequent to the appeal were in judgment before the Lords, and settled by them; but petitioners alleged that they could not have been so settled, and that *Popham* had insisted on the same matter before, which had been ruled against him both in Chancery and in the Lords; and petitioners suggested, that being but trustees for infants they could not safely proceed without the Lords' directions, and therefore they prayed leave to proceed on the bill of review. *Popham* in his answer to this petition stated the marriage of his father Sir *Francis* with the niece and heir of *Henry Rogers* the testator; the recovery suffered by Sir *Francis* after his lady's death to provide for the debts he had contracted; the fears of the testator lest the extravagance of Sir *Francis* should disinherit his infant son, (the respondent,) the will made by him in consequence, with the express condition annexed, (as before stated,) and the death of the testator when the respondent *Alexander* was but three years old.

In 1674 the executors of the testator *Henry Rogers* filed their bill against Sir *Francis* (as before stated) to discover if he had made any and what settlement according to the said condition, to which Sir *Francis* submitted to make such settlement as the court should direct. Sir *Francis* soon after died, and made his will as before stated, devising to his son the respondent more than an equivalent to answer the condition in testator's will: but the trustees insisted that such condition was precedent, and that therefore no estate vested in the respondent *Alexander*,

ander, who in 1680 filed his bill to be relieved against the supposed breach of this condition, which he insisted to be subsequent and not precedent, and on 13th November 1682 Lord Chancellor Nottingham referred it to the Master to inquire and report if Sir Francis had left his son an estate equivalent to the condition, and declared, if so, he would relieve against the supposed breach; and further declared, that the condition was subsequent and not precedent, and further decreed an account of the profits of testator's estate, of which the trustees had been in possession 12 years, and on the 18th May 1683 the cause was heard before North C.S., who affirmed Lord Nottingham's decree (a), and on 3d July 1683 the court, on Bampffield's application, ordered that the quality and manner of the settlement made by Sir Francis on his son should be reserved till after the Master's report of the equivalent.

(a) 1 Vern. 167. S. C.

In June 1685 Bampffield appealed, and on 12th June Popham answered by guardian, but the Lords not having made any order to stay the proceedings below, the Master on 1st July 1686 reported the equivalent (b). To this report Bampffield excepted, which exceptions were over-ruled, and the report was confirmed by Jefferies C. in December 1686.

(b) See the particulars of the Master's report in Colles' P. C. 6.

The cause was finally heard 29th February 1687, when a decree on the foot of all the proceedings was drawn up, signed, and enrolled.

On 1st July 1689 the appeal of Bampffield was heard and dismissed, and the decree affirmed, and afterwards the bill of review and other proceedings stated in the petition were had. It was argued for the respondent, that now to give directions to Chancery to proceed below, would be in effect to unravel and set aside the final judgment of the Lords, and that to set aside the report of an equivalent would be to set aside the decree; for if there was no equivalent, there ought to have been no decree; and that after such a length of time as 22 years to re-examine the value of the lands as they were at the death of Sir Francis, and to unravel what had been 10 years settled in Chancery and allowed by the Lords, was a matter dangerous in its consequence, if possible to be done; and it was further argued, that the petitioners' proceedings tended to undermine and evade the judgment of the Lords, and was against their dignity; wherefore the respondent prayed that the petition might be dismissed, and the decree affirmed, which the

Lords

Lords ordered accordingly, in regard the matters complained of had been already settled by the House.

Note: This petition seems to have been intended to feel the pulse of the House—there is evidently a wilful confusion between the time of lodging the appeal in 1685 and the adjudication in 1689; and in the intermediate time was the report complained of.

It is observable that in 1701 petitioners filed a Bill in Chancery for an injunction to restrain the respondent from committing waste, and for an account of, what timber he had already felled, suggesting (which the court held) that by the will *Popbam* was made bare tenant for life, and that he had no issue, though it appeared that he was then but 30 years old. An injunction was granted accordingly. See a report of this case in 1 P. Wms. 54. 2 Vern. 427. 449. Salk. 236. 2 Eq. Abr. 308. pl. 12.

—Note: In *Allanfon v. Clitherow*, 1 Ves. 26. it is said that Salkeld's report of this case is incorrect. See also an abstract of S. C. *post*, tit. *Estate* by implication.

3. An estate was devised to the eldest son, provided he or his heirs pay 100*l.* a-piece to his three daughters at 21 or marriage. One daughter dies before 21 unmarried. Afterwards T. S. buys the estate; and thinking it subject to the deceased daughter's portion, (a bill being brought for it,) gave a bond to her executor to pay it; and being afterwards advised that the land would not be liable, he brings a bill to be relieved against it. Held by Lord Keeper, that though by the present law the land would not be liable to the portion, yet perhaps when the bond was given it might have been otherwise: and there being no fraud in getting the bond, his lordship would not relieve against it.

M. 1702, cor. Wright, C. S.

Smith v. Avery;

1 Eq. Abr. 269. pl. 9.

4. A. gives a specific legacy to his niece, provided she give no trouble to my executor. Held, that the legatee should release all demands upon the testator's estate, and then the executor should deliver the legacy.

28 Jan. 1703, Dom. Proc.
Lord Mohun v. Duke of Hamilton
& *Ux.* 1 Bro. P. C. 54.

5. Devise to A. and the heirs male of her body, upon condition that she intermarry with and have issue male by one furnished *Searle*; and in default of both conditions, he devised over to B. (in the same manner,) and in default thereof he devised to C. for 60 years, if he so long live, remainder over to the heirs of the body of C. and their issue male for ever. Adjudged that this is a good estate tail (a); that the words of condition amount to a limitation (b), and that the estate of A. or B. does not cease, though she marries one of another name (c), for the remainder is in default of both conditions; and in the mean time it is limited to her and the heirs male of her body, and she may survive such husband, and marry a *Searle*, and so there is a possibility as long as she lives.

T. 1704, B. R.

Page v. Hayward,

2 Salk. 570. 3 Salk. 96.

2 Eq. Abr. 362. pl. 3.

See this case more fully in Piggot on Recoveries 176. than in any other book

Vide post, tit. *Recovery*.

(a) *Vide* Salk. 619.

(b) *Vide* 1 Vent. 199. 202.

2 Co. 72, 73, 74. Stra. 1092.
Doug. 63. 4 Eur. 1931. Fearne's Cont. Rem. Cruise, 134.

(c) *Vide* Randal v. Payne,
1 Bro. Ch. Ca. 55.

In this case the court took a distinction between a collateral condition and a condition that runs with the land. If the donor reserve a rent with a condition to re-enter, a recovery will not bar, otherwise if it be to re-enter for non-payment of a sum in gross (a).

(a) *Vide* 4 Burr. 1936. 1 Mod. 108. 111. 2 Lev. 28. 60.

2 Dec. 1704. Dom. Proc.
Moore & al. v. Crosse and another,
1 Bro. P. C. 84.

6. A warrant was granted for nominating two lives to an estate held under the crown, as part of the dutchy of Cornwall; but subject to these conditions, viz. *provided the estate be perfected in six months after the date of the warrant; that the warrant be inrolled before the auditors of the dutchy; that the fine be first paid into the hands of their receiver-general or his deputy; and a certificate of such payment obtained under one of their hands and seals.* These conditions not being complied with, according to the strict letter of the warrant, it was declared void and ordered to be vacated.

T. 1706, cor. Cowper, C. S.
Scot & Ux. v. Haughton and another, 2 Vern. 560.
1 Eq. Abr. 232. pl. 8.

7. A. gave some lottery tickets among her servants, on condition if any of them come up a prize of 20 s. or more they should give one half to her daughter. The ticket given to the foot-boy came up a prize of 1000 l. On a bill by the daughter for a moiety of the 1000 l. the court said, *cujus est dare ejus est disponere*, and an infant is to be bound by a condition as well as one of full age, and may be a trustee. Decreed a moiety to the daughter accordingly.

17 Feb. 1720, Dom. Proc.
Philips v. Walter Bart. & Ux.
and others, 2 Bro. P. C. 198.
4 Vin. 494. c. 14.
2 Eq. Abr. 199. c. 4.

8. J. S. founded a lectureship, with a salary of 50 l. per ann. charged upon his lands for the lecturer, *so long as he should attend the charge of diligent preaching there once every Sunday, if he should not otherwise, by necessity, be hindered; and when the lectureship should be void by death, removal, departure, or otherwise, the trustees were to appoint a new lecturer.* A. was appointed to this lectureship; but some time afterwards becoming greatly indebted, he withdrew himself, and continued abroad several years. Held, that A.'s extravagance was not such a necessity as could be pleaded in his excuse; and that his so withdrawing himself was such a departure as justified the trustees in appointing a new lecturer.

12 Mar. 1729, Dom. Proc.
Amburst Administrator v. Lytton
& al. 3 Bro. P. C. 486.

9. A. devised his estate to his son in tail remainder to B. for life, on condition that he took the

§ 4. *What a Performance, and where required.* C—O 211

the name of the testator; but if he did not, then the estate was given over to *D.* The son died without issue. *B.* performed the condition, and died. Held, that *B.* having performed the condition, *D.* took no estate, but that on the death of *B.* it went to the heir at law of *A.*

Fitzgib 99. 2 Eq. Abr. 602.
pl. 33. S. C. but not S. P.

10. Devise of a legacy to a feme, on condition that she marry a man of the name of *Barlow.* *A.* takes upon him the name of *Barlow*, and the feme marries him; this is a performance of the condition, and equity will not decree the husband to retain that name.

T. 1730, cor. Jekyll, M. R.
3 P. Wms. 65.
Barlow v. Baileman & al.
Reversed in Dom. Proc. 4 Bro.
P. C. 194.

Note: In Bro. P. C. the condition is stated to be, that the feme shall marry any person of the surname of *B.*, and if she did not, then the legacy was given over to *W.* The feme married a person who assumed the surname of *B.*; but the Lords held that that marriage was not such a performance of the condition as would entitle the husband and wife to the legacy.

11. In a settlement a term was raised for daughters' portions (*i. e.*) 10,000*l.* with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction. The father leaves lands to the daughters of the value of 10,000*l.* This is no satisfaction; for money and land go in quite different channels (*a*), and therefore cannot be taken in satisfaction for each other.

P. 1734, cor. Talbot, C.
Chaplin v. Chaplin,
3 P. Wms. 245.
2 Eq. Abr. 220, pl. 6.
650, pl. 32.

(*a*) *Vide Eastwood v. Vincker*
2 P. Wms. 616.

12. Defendant having been elected one of Doctor *Ratcliffe's* travelling fellows, received his salary for five years, and then, instead of travelling beyond sea for five years more, as the donor's will required, he resigned on account of his ill health; the trustees accepted his resignation, and elected another in his room. This acceptance of the defendant's resignation was held a dispensation of the condition; but if the trustees had refused the defendant's surrender, and insisted upon his complying with the terms of the will or refund his salary, it would have been otherwise.

P. 1737, cor. Hardw. C.
Attorney-General v. Dr. Stephens,
1 Atk. 358.
2 Eq. Abr. 196, pl. 17.
See this case at large, ante, tit.
Charity.

13. Where a condition has been performed to a reasonable intent, the court has dispensed with the want of circumstances (*a*). It was said, (in *Needham v. Vernon*, 1 Eq. Abr. 111.) that all conditions in restraints of marriage are void by the civil law, and that equity only considers them in *terrorem*; yet this is rather taken *pro confesso* than any express determination on that point, and that they are not so by the common law is evident from the case of *Fry v. Porter*, 1 Mod. 300. The rea-

30 April 1737, cor. Jekyll, M. R.
Harvey & al. v. Jenson,
1 Atk. 375.
See a special note to this case
by Mr. Sanders, 1 Atk. 381.
3d edit. et vide post, tit. Marriage,
S. C. more at large.
(*a*) *Vide Dailey v. Desbouvrie*,
2 Atk. 261, and notes to 3d edit.

son the court went upon in *Semphill v. Bailey*, *Pres. in Ch.* 562. was, that the condition was looked upon as a loose inconsiderate expression, and intended to be by way of caution only, for there was no devise over.

16 July 1743, cor. Hardw. C.
Chauncey & al. v. Graydon,
2 Atk. 620.

14. In this case a condition was annexed to a personal legacy, and the excuse set up for non-performing of it was, that defendants had no notice of the condition in the will. *Per Lord Chancellor*—Where a condition is annexed by a will to a devise of real or personal estate, and no notice is required to be given, nor any person obliged to give notice, there the legatees must perform the condition or cannot be entitled; and where they do not, if there is a devise over, a forfeiture incurs (a).

(a) *Vide Hartley v. Aston*,
1 Atk. 361. and notes.

Suppose an estate limited to one for life, and to B. on certain conditions and restrictions, and to C. *in forma prædictâ*; it will take in every condition and restriction in the preceding limitation to B.

20 Feb. 1755, cor. Hardw. C.
Burleton v. Humpbrey,
Ambl. 259.

This distinction is allowed to be law in Francis's Ca. 8 Co. 87.
Fry v. Porter, 1 Mod. 300.
Multon v. Fitzgerald, 3 Mod. 28.
Skin. 125.

15. Notice is necessary to work a forfeiture in an heir at law, though not in a stranger: the latter can only take under the instrument that imposes the condition; but the former is supposed to enter and claim by descent, and has no occasion to know the devise.

3 April 1756, cor. Hardw. C.
Blake v. Leigh, Ambl. 306.

16. A grandfather cannot appoint a guardian of his grandson; but he may give his estate to him, on condition of a particular person being his guardian; and if the father does not consent to it, the estate will be forfeited.

7 May 1766, cor. Northampton, C.
Lord Beaulieu & Ux. v. Lord Cardigan & Ux. Ambl. 533.

17. A father seised in fee of some estates, and others for life, with remainder to his son in tail, devises all to his son for life, remainder over in strict settlement; on condition, that if he neglect or refuse to suffer a recovery of the estate of which he is tenant in tail, within three months after he should attain 22, and settle it to the devised uses, then the other estates to go over to the next in remainder. The son entered and did many acts shewing an election to take under the will; but did not settle the estate as required. Held, that the estate should go as if it had been actually so settled. But this was reversed in the House of Lords; for not having settled the estate pursuant to the condition the devise was void, and then the entailed

Vide 6 Bro. P. C. 231. S. C.
nomine Duke of Montague & al.
v. Lord Beaulieu & al. 13 Mar.
1767.

§ 4. *What a Performance, and where required.* C—O 213

entailed estate would go in its own course, unaffected by the will.

18. A legacy was given upon condition that the legatee should release all claims on testator's estate within a limited time. The legatee took the legacy, but did not actually release. Lord Henley, in 1760, held he was bound by his election, and decreed his executors to release: which decree was affirmed on a re-hearing by Lord Camden.

6 Feb. 1768, cor. Camden, C.
Earl of Northumberland v. Lord Egremont, Ambl. 657.

1 Eq. Abr. 106.

This cause was first heard by Lord Henley, and is reported in Ambl. 540. nomine Earl of Northumberland v. Earl of Aylesford.

19. A. gives to his wife the use of his furniture, &c. at B., on condition of her residing there. He afterwards suffers a recovery of the estate at B., and dying without making any subsequent disposition, it descends to his heir at law. Held, that the wife was entitled to the bequest, discharged of the condition which the recovery had put out of her power to perform.

10 June 1774, Dom. Proc.
Darley Widow v. Langworthy,
7 Bro. P. C. 177. 3 Will. 6.
nomine *Darley v. Darley*.

20. Where an estate is devised upon condition, taking possession binds the devisee to the performance of the condition, though there be a loss; for he should have considered of that before he took possession.

M. 1790, cor. Thurlow, C.
Attorney-General v. Christ's Hospital, 3 Bro. Ch. Ca. 165.

21. Bond delivered to a third person, to be delivered to the obligee on performance of condition, takes effect on performance from the original sealing and delivery, though the obligor and obligee are both dead (a).

H. 1791, Scacc.
Grabam v. Grabam,
1 Ves. jun. 275.

(a) *Vide* Peryman's case, 5 Rep. 34. where this was taken as clear law.

Bond by a *feme* delivered to a stranger before her marriage (b) as an escrow, to be delivered on condition, is good, though the condition be performed after marriage.

(b) *Vide* Froset v. Walshe, Bridg. 51. *Vide* Butler's case, 3 Co. 25. and Brag's case, there cited.

As to conditions restraining marriages, unless with consent, where they shall occasion a forfeiture, or where they are to be considered *in terrorem* only. See *post*, tit. *Marriage*.

In what cases the court will dispense with a condition, or protect against a forfeiture. See *ante*, sect. 2.

SEC. 5. In what Cases the Court will relieve against a Breach or Non-performance of a Condition precedent or subsequent, the Matter resting in Compensation.

M. 1682, cor. Nottingham, C.
Popham v. Bamfield, 1 Vern. 83.
 Colles' P. C. 1—8. fully stated.

(a) *Vide* Ld. Feversham's case,
 cited.

Vide 1 Salk. 156. 2 Vent.
 352. 1 Ch. Ca. 142. 1 Vern.
 223. 457.

Vide 2 Lev. 21. 1 Mod. 300.
 3 Ch. Ca. 131. Raym. 236.

(b) For that class of cases
 where daughters are restrained
 from marrying without consent, *vide* post, tit. *Marriage*.

H. 1683, cor. North, C. S.
Hayward v. Angel, 1 Vern. 222.

Vide 1 Vern. 83. 2 Vent. 352.
 1 Salk. 356.

1. CONDITIONS precedent must be literally performed, and the court will never vest an estate where, by reason of a condition precedent, it will not vest in law (a). But of conditions subsequent, which are to divest an estate, it is otherwise: yet of subsequent conditions there is this difference to be observed, (for against all conditions subsequent, the court cannot, nor ought, to relieve,) when it can in any case compensate the party in damages, for the non-precise performance of the condition; there it is just and equitable to relieve, as if a man's estate be upon condition to pay money at a certain day, and he fails of payment; but where the party cannot be compensated in damages it would be against conscience to relieve, and that was the reason of the judgment in *Fry and Porter's* case, where the daughter having married without such consent as by the condition was required, the non-performance of that condition could not be compensated in damages (b).

2. Upon a demurrer to a bill of review the error assigned was, that defendant's wife's father having given portions to his daughters in case they should release to his heir their right to certain lands: one of the daughters died before she had released, wherefore the heir refused to pay the portions, and thereupon the other daughters having brought their bill to be relieved; they were dismissed.—The portion was 2000 l. to each daughter, and the land to be released was not worth 500 l., and the performance of the condition was prevented by the act of God.—For the demurrer it was argued, that there was a difference between a condition giving a portion, and a portion given upon condition, for in the former case the portion never arises unless the condition be performed: but *Lord Keeper* over-ruled the demurrer, saying, that in all cases where the matter lies in compensation, be the condition

§ 5. Breach relievable as resting in Compensation. C—o 215

condition precedent or subsequent, there ought to be relief.

3. A man devised lands called *S.* to his younger son, and declared that if he should any way be hindered from enjoying them, then in lieu thereof he should have all the lands at *B.* A moiety of the lands called *S.* were evicted from the devisee, who thereupon insisted to have the whole lands at *B.*; but the court decreed that he should have only as much of the lands at *B.* as was equal in value to those evicted.

M. 1684, cor. North, C. S.
Tyle v. Tyle, 1 Vern. 270.
1 Eq. Abr. 106. pl. 3.

Vide 1 Vern. 83. 223. 457.
1 Salk. 156. 2 Vent. 352.

4. *A.* made a voluntary settlement on his eldest son in tail male, remainder to a second son, &c.; proviso, that if his eldest son did not pay the second 600*l.* at 21, his estate should cease. The father married a second wife, and by deed, taking notice that his son had not paid the money according to the proviso, conveyed the same lands to the use of his children by his second wife. The son brought his bill to be relieved against the forfeiture for non-payment on the precise day; but in regard the conveyance was voluntary, and the father might have put what conditions on his son he thought fit, and the proviso being special that the son's estate in law and equity should cease, the court dismissed his bill, and the rather as the son set up a release against his father, which he had obtained by surprise.

P. 1687, cor. Jeffries, C.
Longdale v. Longdale,
1 Vern. 456.

Vide 1 Vern. 83. 223. 271.
1 Salk. 156. 2 Vent. 352. 365.

5. A legacy was given on condition not to dispute the testator's will. The legatee commenced a suit whereby he disputed the validity of the will. Held no forfeiture of the legacy, as there was *probabilis causa litigandi*.

M. 1688, cor. M. R.
Powell v. Morgan, 2 Vern. 914

6. One devised lands to his eldest daughter, on condition that she should, *within six months*, pay certain sums to his two other daughters, and if she failed, he devised the land to his second daughter on the like condition; and so in like manner to his third daughter. The question which arose in this case was, Whether the plaintiff, not having paid the money within the six months, should have the benefit of the bequest, being in nature of a pre-emption? *Per Cur.*—The court may enlarge the time of payment beyond the six months, and has usually done it even in the case of a condition precedent, and in all cases that lie in compensation (a);

21 Mar. 1694, cor. Lds. Comrs.
Woodman v. Blakt, 2 Vern. 222.
1 Eq. Abr. 109. pl. 5.
1 Bro. P. C. 127. & Colles' P. C.
71. S. C. nomine *Master v. Willoughby & Ux.*
In 2 Vern. 166. and 1 Eq. Abr. 109. pl. 6. is a case of same name, and appears to be another branch of S. C. The question there was, Whether the eldest daughter could assign her privilege of pre-emption? which point was not determined; for the court took time to consider of it.

(a) Vide *Barnfield and Popham*,
Colles' P. C. 1.

and this case is stronger in regard there is no devise of the land itself; but the will is in nature of a declaration of trust, and the bill is preferred within the six months, and the plaintiff claimed not a naked power but a power coupled with an interest, and is relievable within the reason of *Pittairne v. Wheeler*.

It seems this decree was reversed by the Lords, 1 Bro. P. C. 127. and Colles' P. C. 74. *Martin v. Willoughby*; where it is said, "This cause being revived by the name of *Woodman*, came on to be heard before the Lords Commissioners on 21st March 1690-1, when it was decreed that *Woodman* should be let into the benefit of the estate on payment of 1500*l.* a-piece to the four surviving daughters of Sir Thomas Badd, by the end of Michaelmas term, and upon such payment the trustee was to convey the estate to *Woodman*, or as he should direct; but in default, the estate to be sold to the best purchaser: which decree the Lords reversed, without making any further order therein."

M. 1695, cor. Somers, C. S.
Sir Thomas Man's case, cited per
 M. R. 2 Freem. 206. 2 Eq.
 Abr. 361. pl. 4.

7. Where a devise of lands was made to the eldest daughter, paying 100*l.* to the second daughter, and 100*l.* to the third daughter, &c.; and if the eldest did not pay the 100*l.* to the second by such a day, then he devised his lands to the second daughter, she paying her sister's portion by a certain day; and if she did not pay, then he devised the land to the third daughter, &c. Resolved, this was not in the nature of a mortgage to be redeemable after the time of payment was over, but that the eldest daughter not paying at the time appointed, the second should have the land; and the eldest had no relief.

M. 1609, cor. Somers, C. S.
Barnardiston v. Fane, 2 Vern. 366.
 1 Eq. Abr. 199. pl. 3.

8. *M.* having issue a daughter, devised his land to his kinsman, paying 1000*l.* to his daughter. The kinsman made default in payment; the daughter, who was heir, brought an ejectment, and recovered. The court relieved the devisee on payment of principal, interest, and costs, though to the disherison of an heir and in favour of a voluntary devisee.

M. 1707, cor. Cowper, C. S.
Grimston v. Ld. Bruce & Ux.
 1 Salk. 156. 2 Vern. 595.
 1 Eq. Abr. 108. pl. 4.
 Vinz 2 Vern. 366. 1 Ch.
 Rep. 161. 1 Vern. 83.

9. *A.* devised his lands to *J. S.* and his heirs, on condition to pay 20,000*l.* to his heir at law, viz. 1000*l.* per ann. for 16 years, and 2000*l.* per ann. after until the whole paid. The heir entered on non-payment of one of the instalments of 1000*l.* and then *J. S.* brought his bill. Objected, that the condition restored the heir, and that equity ought not to aid in disherison of him. But per Lord Cowper—"The entry of the heir in this case was only to enforce the payment of his principal, (as in the case of a mortgagee). The court can give interest from the time the instalment became payable, and wherever the court can give compensation

sation for the breach of a condition they will relieve. The court, therefore, decreed interest on each instalment from the time it became payable, without deduction for taxes, because it was given as a sum in gross, secured by an entry on the lands for non-payment, and not issuing out of the lands.

10. *A.* married *B.*'s daughter: before the marriage *A.* and *B.* entered into an agreement contained in the conditions of two bonds. *A.* was bound to settle lands for a jointure on his wife and her heirs male by him; and *B.* was bound to pay *A.* 800*l.* on a certain day, as his daughter's portion: part of the principal was paid by *B.* and all the interest. *B.* by his will devised all his copyhold lands to *A.*'s wife, on condition she did not disturb his executors for the 800*l.* and died leaving his wife executrix, who married *C.* the defendant. *A.* enjoyed the copyhold estate; his wife died, no settlement being made upon her; then *A.* died, leaving issue a son only by the marriage, whom he made executor. *A.*'s son sued *B.*'s executrix upon *B.*'s bond, and recovered; *B.*'s executrix sued *A.*'s son upon his father's bond, and recovered. *A.*'s son then brought his bill against the executrix, alledging that a sufficient estate descended to him from the father, which was an equivalent performance of the settlement which his father had obliged him to make, and prayed relief against the proceedings at law. Lord Chancellor—If *A.* had left any other son, the intent of the condition would be evaded by the son's leaving a daughter; but as he had not, it was an equitable performance: if there had been another son besides the plaintiff he would have entailed the estate. Held also, that though *B.*'s devise of the copyhold to the wife was no bar to the husband's demand of the 800*l.* yet that should be taken in satisfaction of part of the 800*l.* And so decreed.

P. 1709, cor. Cowper, C.
Bridges v. Bess,
2 Eq. Abr. 340 pl. 2.

11. *J. S.* had an estate in *S.* by his first lady, which was to her in tail; they levy a fine, and declare the uses to them and the issue of their bodies; remainder to *J. S.* and his heirs: they have a daughter *M.* and the feme dies. (Note; On this marriage there were articles, that *J. S.* should leave his daughter 2500*l.* if the trustees demanded it within one year after his death.) *A.* the father of *J. S.* was

M. 1711, cor. Harcourt, C. S.
Anon. 2 Eq. Abr. 217. pl. 2.
5 Vin. Ab. 292. pl. 38.

(a) *Quere*, if this should not be two instead of several?

(b) *Quere*, Was *J. S.* a purchaser of these lands, or had he only a reversionary interest in them? as it seems at the latter end of the case he only had.

was then living. *J. S.* marries a second wife, and by her has issue several (a) daughters. By deed executed in his lifetime he gives the estate in *S.* to *M.* and her heirs; and by deed also charges his lands in *D.* which he had purchased (b), with 5000*l.* a-piece to the three daughters, and dies; *M.* demands the 2500*l.* and interest. *Harcourt C. S.* decreed that *M.* should have the 2500*l.* with interest, from *J. S.*'s death, at 5*l.* per cent. That the estate in *S.* could not be an equivalent, because it moved from her mother, and was the condition of the agreement for the 2500*l.* That the reversion of the lands in *D.* could not be so, because *J. S.*'s father was then living, and there was no respect had to these reversions, neither were they then in being; and to make it an equivalent it ought to be in being and in view at the time of giving the equivalent.

26 July 1712, cor. *Harcourt, C. S.*
Sidney v. Vaughan,
2 *Eq. Abr.* 211. pl. 4.

12. "I give and bequeath to *E.* 100*l.* to be paid him within six months after he shall have served his apprenticeship." *E.* ran away from his apprenticeship, and died. Decreed that the serving the apprenticeship is not the condition annexed to the legacy, but only an appointment when it shall be paid; and the rather, for if *E.* had died before the expiration of his apprenticeship, his representative would have been entitled to the legacy.

1724, cor. *King, C.*
Nutt v. Burrell, Sel. Ca. in Ch. 1.
2 *Eq. Abr.* 364 pl. 18.

13. *A.* gives *B.* a legacy, on pain of forfeiture of it in case he should give his wife any trouble in relation to his estate; and makes his wife executrix. *B.* brings a bill against the wife, for which there was very little colour, and, amongst other particulars, demands the legacy. Lord Chancellor *King* was of opinion that the suit was very frivolous; and though he would not make the legacy forfeited, yet declared, if *B.* did not pay the executrix the costs she had been out of purse he would dismiss the bill.

SEC. 6. Of void Conditions.

8 Mar. 1727, cor. *Jekyll, M. R.*
Wholey v. Cox,
2 *Eq. Abr.* 549 pl. 49.

1. TESTATOR by will, in 1729, (int. al.) devised to defendant his nephew, his heirs and assignees, all his real estate in *O.* and (reciting that he had promised his niece Mrs. *Wholey* to give her 500*l.* to be paid within six months after his decease,)

decease,) he went on to say, and my will is that my said estate at O. shall stand charged with the said sum of 500*l.* to be paid at the time aforesaid; and I have devised the said estate to my nephew, his heirs and assigns, upon condition he pay the said sum of 500*l.* at the time aforesaid. Testator gave other legacies charged on his said estate at O. payable within three years after his death, and made defendant his executor and residuary legatee, and in 1730 he died. His niece, Mrs. Whaley, died within three years after the testator, and so did John Whaley one of the legatees. Peter, the father and administrator of John Whaley, brought a bill for his son's legacy, and insisted that defendant, as heir at law to the testator, was entitled to the 500*l.* charged on the real estate. Upon the hearing a question arose, Whether this 500*l.* was a charge upon the real or personal estate in the first place? Master of the Rolls was of opinion, that the 500*l.* was a charge on the lands at O. in the first place, and that both the real and personal estate were given by the testator to the same person, subject to that charge, and that the personal estate would not be exempt, but go in aid of the real (a). Testator did not only charge his lands at O. with this 500*l.* as he did with other legacies, but he distinguished this 500*l.* by devising these lands to defendant in fee, on condition that he paid the 500*l.* Now though this is a void condition, and none but the heir can take advantage of a condition, and so indeed is the devise void for the same reason, and the lands descend to the defendant as heir at law; yet this particularity in the will serves to shew the testator's intention, that his lands at O. should be appointed to the payment of this 500*l.* in the first place, and not his personal estate. His Honor decreed to plaintiff as administrator of his son John Whaley his legacy as a vested legacy, to be raised out of testator's real estate, with interest and costs, relying on the case of *Wilson and Spencer*, 3 P. Wms. 172.

(a) *Vide Doleman v. Smith*,
2 Vern. 740. Prec. in Ch. 156.

2. His Honor in this case said, he took it to be now settled, that if a pecuniary legacy is given on condition of marriage with consent, and there is no devise over, such condition is void. None of the cited cases (b), he said, came up to the present, which is the case of a portion charged on land *. *King v. Withers*, 1 Eq. Abr. 112. was also cited; but there the testator appointed two periods for

30 Ap. 1737, cor. Jekyll, M.R.
Harvey & al. v. Aston,
1 Atk. 375.

See a special note to this case by
Mr. Sanders, 1 Atk. 381. 3d edit.

(b) *Vide Bellasis v. Ermine*,
1 Ch. Ca. 22. *Fleming v. Walgrave*, 1b. 58. *Garret v. Pritty*,
2 Vern. 293. cited.

* The rule that a condition to marry with consent is in *terrorum*

only where no devise over, holds for vesting his daughter's portion, viz. marriage, or only in case of legacies, not of age of 21 (a).

(a) *Sheriff v. Morlock*, W. Kel. 24. 2 Eq. Abr. 546. pl. 23. was a case of a legacy out of land, on condition that the legatee married with consent; if not, the legacy to sink into the estate for the benefit of the devisee of the land. The legatee married without consent, and it was insisted that the testator's direction, that the legacy should sink, amounted to a limitation over. But *Jekyll, M. R.* (in 1731) said, This being a devise out of land, differs from personal legacies, and the legacy is forfeited. See the principal case at large, and many other authorities to this point, post, tit. *Marriage*.

14 Jan. 1739, cor. Hardw. C.
Graydon v. Hicks, and *Graydon v. Graydon*, 2 Atk. 18.

Vide Co. Litt. 206. *Peyton v. Bury*, 2 P. Wms. 626. *Jones v. Suffolk*, 1 Bro. Ch. Ca. 529. *Harvey v. Aston*, 1 Atk. 361. and notes.

3 Nov. 1759, cor. Henley, C. S.
King v. Bursbell, Amb. 379.

3. It is the constant rule of law in conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void.

4. Devise of land to *J. H.* for life, remainder to his issue male, and to his and their heirs, share and share alike; and for want of such issue, to his issue female, and her and their heirs, remainder to *John King*, his heirs and assigns; with a proviso, that if *J. H.* or his issue, or any of them, shall alienate, mortgage or incumber, or do any act to defeat the bequests, he or they shall pay, and he charges the premises with 2000*l.* to such person who should or ought to take next under the above limitations. *J. H.* had two daughters and no son, and he and his daughters suffered a recovery. Bill to be paid the 2000*l.* Held, *J. H.* took an estate-tail (b), and that the proviso was repugnant to the estate.

(b) *Vide Wright v. Pearson*, Amb. 358.

Note; In *Jacobs v. Amyat*, 4 Bro. Ch. Ca. 422. Lord Loughborough doubted the accuracy of this case; he said it did not require the declaration here stated. *J. H.* has destroyed his own estate for life. The only thing was to declare the act of the tenant for life tortious and the recovery invalid. It would be worth while, his lordship said, to consult the register's book, and see if the decree was not prefaced with some declaration to that effect.

10 Mar. 1797, cor. M. R.
Bradley v. Pixoto, 3 Ves. jun. 324.

5. *Thomas Bradley* by will gave his son *H. B.* " the dividends arising from 1620*l.* bank stock
" for his support during his life, but at his decease
" the principal and interest to devolve to his heirs,
" executors, administrators, and assigns. Having ob-
" served so many fatal examples of children left in a
" state of opulence, who had been reduced to want
" the common necessities of life; testator's principal
" view in his will was, that his wife and children
" should have a solid sufficiency during their lives.
" For this purpose he most strictly ordained, that
" if his wife or any of his children should attempt
" to dispose of all or any part of the bank stock,
" the dividends of which he bequeathed to them
" for their support during their lives, such attempt
" should exclude them so attempting from any be-
" nefit under his will, and they should forfeit the
" whole of their share, principal and interest, which
" should

" should go to and be equally divided among such
" other of his children as should observe the tenor
" of his will and testament."

The present bill was filed by *H. B.*, testator's son, against one of his daughters, who had taken out administration, praying that the defendant might be decreed to transfer the 1620*l.* stock to plaintiff. The other children were out of the jurisdiction.

Per M. R.—The first clause is an absolute gift of the principal and the dividends. But then came a clause with which the plaintiff did not comply *, and a question arose, Whether by the rules of equity he can demand his legacy, not having so complied with the injunction laid upon him by the testator; or rather, whether the condition is consistent with the gift? Seeing the testator's intention so clearly and strongly expressed, his Honor took some pains to satisfy himself if he could refuse the demand the plaintiff made, and considering that those children who were stated to be out of the jurisdiction were not necessary parties to the suit, his Honor felt himself obliged to say, that the proviso in the testator's will was of no effect.

It is a rule long since established, that where there is a gift upon a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition that a tenant in fee shall not alien, is repugnant, and there are many other cases of the same sort (a); in all which cases the gift stands, and the condition or exception is rejected. In the present case his Honor was under a necessity of declaring, that the gift was with a qualification inconsistent with the gift itself, and the qualification must therefore be rejected. His Honor felt himself obliged to determine, that this condition was repugnant to the gift, and void. Decreed accordingly, and that upon payment of costs by the plaintiff, the stock be transferred to him.

Dj. 264.—*Mildmay's case*, 6 Co. 40. *Sukely v. Butler*, Hob. 168. are of the same kind, where it was held, that an exception of the very thing that is the subject of the gift is of no effect.

In *Peixoto v. Bank of England*, 3 June 1797, the subject of which was a disposition of stock by the testator in precisely the same manner. Lord Chancellor was clearly of opinion it was an absolute and not a limited interest; and decreed accordingly.

* It may be presumed from this that the plaintiff did attempt to dispose of some part of the Bank stock bequeathed by the testator; but it does not appear from the reporter's statement of the case.

(a) *Vide Piers v. Winn*, 1 Vent. 321. Roll. 435. which case, as reported by Vent. is very confused; but it clearly appears from a report of same case in Pollexf. that the court meant to say, that where there is a gift in tail, with a condition not to suffer a recovery, the condition is void.—There are several cases of this kind collected in 2 Danv. Abr. 22. which shew that a condition repugnant to the nature of the estate given is void. Co. Litt. 223. a.

Condition of an Obligation, see Bond.

—— to marry with Consent—Bar-
riage.

Condition

Condition of Sale—Sale.

See also *Covenant—Deeds—Devise*
—Estate—Landlord and Tenant
—Portions—Power.

C—o

Consent.

SEC. 1. How far a Man shall be bound by his own Consent or Acquiescence, confirmed (as it may be) by Length of Time, *et à contra*: And herein of a Consent not expressed but implied.

H. 1679, cor. Finch, C.

Clarke v. Perrier,

2 Freem. Rep. 48.

2 Eq. Abr. 707. pl. 1.

But if it had stood barely upon the construction of the law, without any proof of the consent or approbation of *J. S.* there *A.* must have sustained the loss, according to the rules of common law in case of bailment, as *1 Inst. 39. (a)*; and his lordship cited *Exod. c. 22.* that the Levitical law was so. This case rested merely upon the construction of law; which is, Whether a scrivener disposing of money deposited generally in his hands upon *bad security* shall be answerable for it, there being no proof of any fraud or collusion in the scrivener? or, Whether the owner of the money shall stand to the loss of it?

(a) As if I deliver goods to another to keep, and he lose them by any accident, the loss shall fall upon him, unless he qualifyeth the construction of law by saying that he will keep them as his own, and then the loss, if it be involuntary, falleth upon me.

M. 1684, cor. North, C. S.

Parker v. Ashe, 1 Vern. 257.

1. *J. S.* deposited 300*l.* in the hands of *A.* a scrivener. *A.* placed the same out at interest upon a mortgage of houses, and took the mortgage in *J. S.*'s name, which mortgage after proved defective. *J. S.* for many years received the interest, but it did not appear that *J. S.* did ever assent to this mortgage, or that he did give *A.* a general authority to dispose of it at interest as he thought fit, neither did it appear that he had laid any restraint upon *A.* not to dispose of it without his approbation. But it afterwards appearing by the proofs, that *J. S.* had by his agents received interest for several years, and in the receipts had taken notice of the principal being in mortgage upon the said security, Lord Chancellor was of opinion that *J. S.* ought to sustain the loss, and reversed a decree made by his Honor to the contrary.

2. Bill for payment of a legacy which in testator's will had been erased, as it was supposed, by testator himself, but when the matter was contested in the spiritual court, the executrix submitted that the will should be proved as if no such erasure had been made, and an instrument purporting her consent

§ 1. Where binding—implied Consent.

sent was annexed to the will. *Lord Keeper* thought the executrix was concluded by her consent, which had prevented the examination of the matter when it was fresh, and probably she knew that the erasures could have been proved to have been made after the testator's death; but his lordship said, the usual course in such cases was to have a sentence against the rasure, and then a probate granted, with the words erased inserted therein.

3. A mother who was absolute owner of a term was present at a treaty for her son's marriage, and heard him declare that the term was to come to him at her death, and was a witness to the deed whereby the reversion of the term was settled on the issue of that marriage. Upon a bill brought by the issue of that marriage, the mother was decreed to make good the settlement, and to settle the reversion of the term accordingly after her death.

T. 1690, cor. Lds. Comrs.

Hunsten v. Cheyney,

2 Vern. 150.

1 Eq. Abr. 355. pl. 7.

Note; The case of *Dr. Amyas* was cited, where he stood by and suffered a purchase without disclosing his title. Also the case of *Clare v. Earl of Bedford*, who only witnessed a deed, and told the money lent at his master's chambers, (being only a clerk,) and for that alone had his own security postponed.

4. Though the suggestions of fraud be probable and apparent, yet if the party complaining by his own solemn act acquiesce, equity will not relieve him.

16 Ap. 1698, Dom. Proc.

Lloyd v. Tym Administratrix and another, Colles' P. C. 14.

5. Where a decree or order appealed from is expressed to be made upon the appellant's own consent, the appeal will be dismissed.

19 Feb. 1702, Dom. Proc.

Northcote v. Northcote,

Colles' P. C. 287.

4 Vin. Abr. 477. 7 Vin. Abr. 398.

8 Vin. Abr. 299.

Vide *Proc. in Ch. 115.* cited in *Sparing v. Lynn*; 2 Vern. 177. cited in *Roberts v. Bennet.*

6. Where an incroachment of a water-course was made in the infancy of the ancestor, who after full age acquiesced under it 21 years, though such infancy was urged, yet Lord Chancellor *Cowper* took no notice of it.

H. 1707, cor. Cowper, C.

Lord Guernsey v. Rodbridges,

Gibb. Eq. Rep. 3, 4.

2 Eq. Abr. 518. pl. 1.

7. *A.* diverted a water-course, which put *B.* to great expences in laying of sooths, &c. and the diversion being a nuisance to *B.* he brought his action; but an injunction was decreed upon a bill exhibited for that purpose, it being proved that *B.* did see the work when it was carrying on, and connived at it, without shewing the least disagreement, but rather the contrary. *Short v. Taylor*, in Lord Somers's time, was cited, which was, *Short* built a fine house; *Taylor* began to build another, but laid part of his foundation upon *Short's* land; *Short*, seeing this, did not forbid him, but on the contrary

M. 1709, cor. Cowper, C.

Anon. 2 Eq. Abr. 522. pl. 3.

contrary very much encouraged it; and when the house was built, he brought an action; and Lord Somers granted an injunction, and said, it was but just, and reasonable; for being a nuisance, every continuance is a fresh nuisance; and so he would be perpetually liable to actions, which would be hard, when he was encouraged by the party himself.

9 July 1713, Dom. Proc.
Wickelise v. Short,
1 Bro. P. C. 414.
7 Vin. Abr. 298. pl. 15.
15 Vin. Abr. 478. pl. 2.
2 Eq. Abr. 177. pl. 1.

8. After a decree of foreclosure made absolute, and an acquiescence of eleven years in the mortgagee's possession under it, no parol evidence of his promising to account and re-convey on payment of his money, can be admitted.

Upon the hearing of this case in Chancery, Lord Harcourt said, the plaintiff came too late; that he knew no instance where a man was let in to redeem by a new bill, after a decree of foreclosure, signed and enrolled, upon any parol agreement or declaration, or by reason of over-value of the estate. Such a thing would be of dangerous consequence, and shake abundance of titles. Perhaps there may be an instance of relief upon a bill to redeem after a decree of foreclosure; but then the bill was brought in a very short time after the decree, and there must be some extraordinary circumstance in the case. His lordship did not, however, remember any such case of relief.

M. 1716, cor. Cowper, C.
Peter v. Russell, 2 Vern. 726.
Gilb. Eq. Rep. 122.
1 Eq. Abr. 321. pl. 7.

Vide Raw v. Pott, Lady Bridgewater v. Russell, *Clare v. Earl of Bedford*.

H. 1717, Cowper, C.
Mocatta v. Murgatroyd,
1 P. Wms. 393.
2 Eq. Abr. 612. pl. 2.

9. *A.* having a mortgage of a leasehold estate, the mortgagor borrowed the original lease of *A.*, and by that means procured more money on the premises; but pretended he wanted it for another purpose. *Per Lord Chancellor*—If *A.* was privy to the mortgagor's intention of borrowing more money on the premises, *A.*'s mortgage shall be postponed to the second mortgage, he being accessory to the fraud; but otherwise it will be if he innocently lent the lease to the mortgagor.

10. An owner of a ship mortgages his vessel to *A.* by deed, leaving with him the original bill of sale, without any indorsement or notice of the mortgage on the bill of sale as is usual. Afterwards the mortgagor borrowed this bill of sale of the mortgagee, and made several subsequent mortgages, all of which were indorsed on the bill of sale when returned to the mortgagee, who made no objection or complaint. It appeared also in the case, that the mortgagor had made a mortgage prior to that to *A.*; but the prior mortgagee was a witness to *A.*'s mortgage deed, and that *A.* afterwards took a release from the mortgagor of his equity of redemption.

In this case Lord Cowper determined the following points:

1st, That

1st. That where a first mortgagee is witness to a second mortgage, though no actual proof appears of his knowing the contents; yet since the presumption is, that he might have known them, and as a subscribing witness he undertook to support them by his evidence (a), he shall be postponed (b), for he ought to have acquainted the second mortgagee of his former mortgage.

(a) The reporter says, Quere tamen, Whether the bare attesting a subsequent incumbrance without other circumstances of presumptive notice will postpone a prior incumbrance, since a prior incumbrancer may by those means be cheated of his security without any ill intention or fraud on his part?

(b) None of the cases seem to come up to this point. *Vide* Hobbs v. Norton, 1 Vern. 136. Peter v. Russell, 1 Eq. Abr. 311. pl. 7. Ibbotson v. Rhodes, 2 Vern. 554. Head v. Egerton, 3 P. Wms. 280. Berisford v. Milward, 2 Atk. 49. Anon. cited 2 Ves. 96. Beckett v. Lordley, 1 Bro. Ch. Ca. 353. from which it appears, that, in order to postpone a prior mortgagee, it is necessary to prove against him fraud or actual notice of the subsequent mortgage; and therefore in Becker v. Lordley, Lord Thurlow thought the principal case went too far in imputing notice to the first mortgagee, from the mere circumstance of his being a witness to the second mortgagee, since it is the common practice for persons to attest the execution of deeds without being made acquainted with their contents. N. B. Mr. Cox, the editor of P. Wms. Rep. seems to have searched for the decree in the principal case, without being able to find it.

2dly. That where a mortgagee is so careless as to entrust the mortgagor with the original bill of sale, (by which means indorsements of subsequent mortgages are made,) and then to take back the bill of sale, without making any complaint, or taking any exception: this, together with the long acquiescence afterwards (c), amounts to an implied consent in A. to the subsequent mortgages, and shall give them a preference.

(c) The length of time does not appear.

3dly. Though A., the mortgagee, when there were subsequent mortgages, took afterwards a release of the ultimate equity of redemption; yet this did not oblige A. to pay the intermediate mortgages, provided he would waive such release.

4thly. The mortgagee A. was ordered to pay the costs of the plaintiffs, the subsequent mortgagees; but that he should not have them over against the mortgagor, for in regard he had made an unjust defence, he should notonerate his pledge therewith.

11. Where churchwardens, with the consent and by the order of the parish, commence a suit; such consent was held to bind the parish, and the vestry book, kept for the entry of the parish acts, was allowed as evidence of the consent.

T. 1718, cor. M. R.
Case of Radnor Parish in Wales,
2 Eq. Abr. 203. pl. 3.
4 Vin. Abr. 529. pl. 10.

12. It is not consistent with the rules and practice of courts of equity, or warranted by precedents, to enlarge the time for redemption of a mortgage, after the mortgagor's acquiescence, for six years, under a foreclosure by his own consent;

18 Jan. 1719, Dom. Proc.
Lant v. Crispe and another,
2 Bro. P. C. 111.
15 Vin. Abr. 469. pl. 13.
2 Eq. Abr. 599. pl. 21.

and especially after an alteration has been made in the estate, either by pulling down the buildings, or enlarging them, or otherwise.

1 Feb. 1722, Dom. Proc.
Strom & Un. & al. v. Byrne,
2 Bro. P. C. 399.
25 Wm. Abr. 55. pl. 37.
2 Eq. Abr. 222. pl. 5.

13. A mortgagee in possession, under a legal title, for upwards of 70 years, shall not be deemed, nor shall such possession be disturbed in a court of equity; so long an acquiescence, without applying for a redemption, being deemed equal to, and taken as an implied waiver, or release of the right to redeem; and the rather in this case, as the rents did not, for more than 50 years, amount to the interest of the mortgage money.

23 Feb. 1727, Dom. Proc.
Jones & Un. v. Kenrick,
3 Bro. P. C. 315.
15 Wm. Abr. 470. pl. 18.
2 Eq. Abr. 602. pl. 31.

14. A decree of foreclosure, after an acquiescence of 20 years, shall not be set aside upon a bill of review for errors in *form* only, and not of *substance*, and therefore a demurrer to such a bill is good.

H. 1733, cor. Talbot, C.
Buck v. Fawcett, 3 P. Wms. 242.
2 Eq. Abr. 22. pl. 7.
492. pl. 8.

15. An agreement was signed by the parties, and by consent, made an order of court, to submit to such decree as the court should make, and neither party to bring an appeal; yet the cause allowed to be re-heard.

13 Nov. 1740, cor. Hardw. C.
East India Company v. Vincent,
2 Atk. 83.

16. Where a man, conscious of his right, suffers another to build on his ground, without notice or without setting up his right till afterwards, the court will oblige the owner to permit the person building to enjoy it quietly.

But these sort of cases never have been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement: there, if persons will build notwithstanding, they must take the consequence, as it is not such an acquiescence as will prevent the owner from insisting on his right.

So where the agent of a company, in treaty with the owner of ground, makes no answer or objection to the terms insisted upon by the owner, and immediately afterwards the company proceed to build; the silence of the agent shall be construed an acquiescence to the owner's proposal, and shall bind the company.

6 Aug. 1743, cor. Hardw. C.
Ex parte Nutt, 1 Atk. 102.

17. Where a person, against whom a commission is taken out, has surrendered himself, and acquiesced a year and a half under it, the court will

will not direct an issue to try the bankruptcy, even though the act of bankruptcy were doubtful; but leave him to an action of trover against the assignees.

18. A fine was levied by husband and wife of her lands to a purchaser, but the uses were declared by the husband only; no other deed being shewn declaring different uses, and the uses declared not varying from what the wife intended, it shall bind her notwithstanding; particularly as she had acquiesced for 15 years after her husband's death, and then brought her bill for possession, suggesting she was not bound by the fine, as she did not join her husband in his declaration of the uses. Bill dismissed (a).

10 July 1744, cor. Hardw. C.
Stanton v. Raven, 3 Atk. 105.

(a) *Vide* Buckwith's case,
Mo. 197. 2 Co. 57. 2 Roll. Abr. 798. Anon. Mo. 22. pl. 73. Dy. 290. pl. 61.

19. If a man build upon another's land, having no title to it, and the owner is passive and stands by without giving notice of his title, the builder shall have the land in equity; for there *solum cedet edificatio*.

11 Dec. 1744, cor. Hardw. C.
Attorney-General v. Balliol College,
9 Mod. 411.

20. Plaintiff being entitled to a share of his father's personal estate, when he had been of age only ten days he signed a release to his mother, the executrix, who afterwards married the defendant. After an acquiescence of five years (the mother being dead) plaintiff brought his bill against her second husband and representative, for an account of his late father's personal estate, and sought to set aside the releases given by him to his mother.

27 Feb. 1746, cor. Hardw. C.
Steadman v. Palling, 3 Atk. 427.

Lord Hardwicke said, that the procuring releases from a person immediately on his coming of age, was always a circumstance to create a suspicion of unfairness; but as there was no particular instance of imposition charged through means of the defendant, his Lordship directed the Master to take only an account of the personal estate of the plaintiff's father, which the wife was possessed of at the time of her intermarriage with the defendant, and not so far back as the death of her first husband; and his Lordship would not determine the question as to the unfairness of the releases, till the Master had taken the account of the father's personal estate only.

21. An agreement, not signed by one party, is binding on him, where acquiesced in and acted upon, for it is the agreement of all.

1 Feb. 1748, cor. Hardw. C.
Owen v. Davies, 1 Ves. 82.

27 Feb. 1775, Dom. Proc.
Toder & Ux. v. Sanjam & al.
 7 Bro. P. C. 244.

22. It is a known and established rule, that an appeal does not lie against an order made by consent of parties.

SEC. 2. How far a Man shall be bound by the Consent of his Counsel, Solicitor, or Agent.

20 Nov. 1684, cor. North, C. S.
Smith v. Turner, 1 Vern. 274.

(a) It is presumed the defendant pleaded the former decree, and demurred to the bill of review.

1. UPON a bill of review in this case it was assigned for error that there was no ground for making the decree, only that it was made by consent of plaintiff's counsel, and that he ought not to be concluded thereby. To this bill defendant pleaded and demurred (a), and upon debate of the matter *Lord Keeper* allowed both plea and demurrer, for that the decree being grounded on a consent ought not to be impeached by the bill of review.

H. 1699, Dom. Proc.
Downing v. Cage,
 1 Eq. Abr. 165. pl. 4.

2. D. brought an appeal to the Lords from a decree in Chancery by consent, suggesting, that though the register in drawing up the order (from the minutes) had drawn it as a decree by consent, yet he never did consent even by his counsel to such decree; or, if they did, it was without his authority: this was supported by an affidavit. Yet the appeal was dismissed.

P. 1717, cor. Cowper, C.
Anon. 5 Vin. Abr. 522. pl. 35.
 2 Eq. Abr. 55. pl. 2.

3. A steward has a general authority to make contracts with the tenants, &c.; but this will not bind the lord without his consent and approbation, or unless part of the bargain is actually executed.

15 Nov. 1720, cor. Hardw. C.
East India Company v. Vincent,
 2 Atk. 83.

4. Where the agent of a company in treaty with the owner of ground makes no reply or objection to the owner's terms, and immediately afterwards the company proceed to build, the silence of the agent shall be construed such an acquiescence on the part of the company as will bind them to the contract.

15 May 1754, cor. Hardw. C.
Bradish v. Gee, Amb. 229.
Vide *Richmond v. Tallieur*,
Floyd v. Mansel, Sir George
Downing v. Cage, 1 Eq. Abr. 165.

5. A decree made by consent of counsel cannot be appealed from. If the party himself did not consent, his remedy is against his counsel.

For more on the subject of consent, see *Master and Servant—Power and Authority—Solicitor and Client*.

Assent

Assent of an executor to a legacy, see *Executor and Administrator—Legacy*.

Consent, as a condition precedent to a marriage—how far binding or how far considered as *in terrorem* only, see *Marriage*.

Consent of a feme covert to part with her separate interest in personal property, and of her examination in court as to such consent, in analogy to a fine at law, see *Baron and Feme*.

Consideration.

SEC. I. Of lawful and valid Considerations, against which Equity will not relieve.

MARRIAGE, even without a portion paid, is a sufficient consideration to give the grantee greater equity than the heir.

M. 1681, cor. Finch, C.
Benfon v. Bellasis, 1 Vern. 17.
Max. Marriage is the highest consideration in law. Vide 2 Mod. 17.

8. C. Articles, covenant, or even a bare promise, before marriage, to settle a jointure, shall be executed in equity against the heir.

Vide *Moore v. Hart*, 1 Vern. 201. *Speake v. Speake*, 1 Vern. 217. *Cranmer v. Duke of Southampton*, Show. P. C. 83. 1 Vern. 339.

2. Articles made for a valuable consideration, and the money actually paid, will bind an estate in equity, and prevail against a judgment creditor, mesne betwixt the articles and the conveyance; but this must be where the consideration paid is somewhat *adequate* to the thing purchased.

T. 1715, cor. Cowper, C.
Finch v. Lord Winchelsea, 1 P. Wms. 282.

Where the sum paid for the purchase of an estate is *inadequate* to the value of the land sold, this shall not prevail against a mesne judgment creditor who has a legal lien on the estate.

3. Bill for discovery of the consideration of a promissory note for 275 l., suggesting that it was given *ex turpi causa*, to another, and make up a felony, &c. Defendant by his answer says, that he lost such a sum, and verily believes that it came to plaintiff's hands, and that was the real consideration of giving the note. Cowper C. dismissed the bill with costs; for what the defendant had

M. 1718, cor. Cowper, C.
Guiborn v. Fellows, 2 Eq. Abr. 160. pl. 5.
5 Vin. Abr. 408. pl. 20.

sworn (not being disproved) was a sufficient consideration to support the note.

1 Feb. 1719, Dom. Proc.
Duke of Hamilton v. Ingleton,
 2 Bro. P. C. 118.
 2 Eq. Abr. 456. pl. 8.
 11 Vin. Abr. 279. pl. 53.

M. 1721, cor. Parker, C.
Ramsden v. Odfield,
 4 Vin. Abr. 453. pl. 5.
 2 Eq. Abr. 390. pl. 2.

(a) *A.* by his letter said he was willing to join with him (the intended husband) to indemnify the lady's jointure from the annuity, and did by that his letter oblige himself so to do.

4. An attorney having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which were then carried on; this is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there be assets or not.

5. Plaintiff's late husband, in his treaty of marriage with her, proposed that his friend *A.* should join him in a bond of indemnity against a rent-charge that was issuing out of his estate. *A.* undertook so to do by letter in the most positive terms (a), but never executed the bond. Upon the confidence of this letter the estate (subject to the rent-charge) was settled on the plaintiff, and the marriage took effect. The husband died insolvent; *A.* also died; and upon this the plaintiff brought her bill against his executors and also against his heir at law and devisee, to be protected against the rent-charge. *Per Lord P.*—The marriage of plaintiff and her husband, in confidence of *A.*'s letter, was a good consideration, and sufficient for such a promise or undertaking; for though no profit accrued to *A.*, yet the plaintiff without this promise would be liable to a loss, which is a sufficient consideration to support an assumpsit at law. The promise of *A.* is direct and positive in the present tense, and written with an intention to shew to plaintiff's counsel, to satisfy him that her jointure should be indemnified from the rent-charge, and upon this the match was made. Though the letter of *A.* would not bind his heir at law, being by simple contract only, yet it would bind him as devisee of the real estate, subject to the payment of debts; for thereby the lands are liable to the payment of all debts whatever; and his lordship decreed an account to be taken of what was due for arrears of the annuity, that the same should be paid by an appointed day, and that the devisee of *A.* should give security to indemnify the plaintiff in future.

M. 1723, cor. M. R.
Clarkson v. Hanway,
 2 P. Wms. 204.
 Affirmed on appeal by Lord
 Macclesfield.

6. Although the consideration of blood be a good consideration, yet that is not to be regarded if a pecuniary consideration is expressed in the deed.

§ 1. *Lawful, and not relievable against.*

deed. So if a grant be made to two, and one only is of kin, it is a good cause of objection.

7. Where there is a valuable consideration for an agreement on all sides, there is sufficient ground to go into equity, and a court of equity is very desirous to lay hold of any just ground to carry an agreement into execution, as where it is entered into to establish the peace or save the honor of a family; and where it is reasonable the court will if possible decree a performance.

8. It is no ground for a court of equity to set aside a deed, that one person had put an unguarded confidence in another.

Though the *consideration* is not expressed in a deed, yet if the court sees what was the real and material consideration, it has great weight with the court, notwithstanding the statute of frauds and perjuries (a).

9. A settlement, though made after marriage, yet being in consideration of a portion that was paid at the time, cannot be impeached by subsequent creditors (b).

(b) *Vide Colville v. Parker*, Cro. Jac. 158. *Anon. Prec. in Ch.* 101. *Jones v. Marsh*, Ca. temp. Talb. 64. *Russell v. Hammond*, 1 Atk. 13. 15. *Brown v. Jones*, 1 Atk. 190. *Lanoy v. Athol*, 2 Atk. 444. 446. *Ward v. Shallet*, 2 Vef. 16. 18. *Hilton v. Biscoe*, 2 Vef. 308. *Wheeler v. Caryl*, Amb. 121.

10. All marriage agreements differ from other agreements; for these do not arise from the consideration of a portion only, but from the marriage; and marriage without a portion is in itself a consideration for an agreement (c).

Though a woman's fortune falls short of the husband's expectation, that is no reason for setting aside a marriage agreement.

11. Though the court will favor creditors as far as they can, it must be where they have a superior right.

If a bankrupt had made a settlement without consideration, it is not good; but if a settlement is made before marriage, it is good, though without a portion, for marriage itself is a consideration (d), and it is equally good if made after marriage, provided it be upon payment of money as a portion or a new additional sum of money, or even an agreement

2 Aug. 1739, cor. Hardw. C.
Stapilton v. Stapilton,
1 Atk. 22-10.

6 June 1741, cor. Hardw. C.
Langley v. Brown, 2 Atk. 1202.

(a) *Vide Lloyd v. Spillet*,
2 Atk. 150.

8 Dec. 1742, cor. Hardw. C.
Sileman v. Ashdown and others,
2 Atk. 477.

Note: The settlement in this case was made as far back as 1694.

Jones v. Marsh, Ca. temp. Talb. 64. *Russell v. Hammond*, 1 Atk. 13. 15. *Brown v. Jones*, 1 Atk. 190. *Lanoy v. Athol*, 2 Atk. 444. 446. *Ward v. Shallet*, 2 Vef. 16. 18. *Hilton v. Biscoe*, 2 Vef. 308. *Wheeler v. Caryl*, Amb. 121.

1 Aug. 1744, cor. Hardw. C.
Ex parte Marsh, 1 Atk. 158.

(c) *Vide Brown v. Jones*,
1 Atk. 138. 190. *Lanoy v. Athol*, 2 Atk. 445.

25 Oct. 1744, cor. Hardw. C.
Brown v. Jones & al.
1 Atk. 190.

(d) *Vide Ex parte Marsh*,
1 Atk. 158. *Lanoy v. Athol*,
2 Atk. 445.

(a) Such settlements are good not only against creditors but against purchasers. *Vide* Colville v. Parker, Cro. Jac. 158. Jones v. Marsh, Ca. temp. Talb. 63. Ward v. Shallet, 2 Vef. 16. Hylton v. Biscoe, 2 Vef. 308. Wheeler v. Caryl, Amb. 121. Lacey v. Athol, 2 Atk. 444. 516.

agreement to pay money, if the money be afterwards paid pursuant to the agreement (a).

Where there is a conveyance by lease and release, and the lease is lost, it does not at all affect the substance of the case; for if a consideration be proved, the release will amount to a covenant to stand seised (b).

(b) That is to say, a consideration of marriage or blood for a pecuniary consideration, will not raise a use by way of covenant to stand seised. For the reasons of this distinction, see Sanders on Uses and Trusts, fo. 558. *Vide* also Lloyd v. Spillet, 2 Atk. 149. And here it is observable, that if a person pays a valuable consideration for an estate, and by some defect or omission in the conveyance of the purchased lands to him, the legal estate is not properly conveyed: in this case, though the consideration could not create a use by way of covenant to stand seised, yet the vendor would be considered a trustee for the purchaser. *Vide* Pollifsen v. Moore, 3 Atk. 273. *et vide* post, tit. Trusts, Uses.

In the case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the donor; otherwise where it is a settlement for a valuable consideration, and in the nature of a contract for the benefit of a wife and of the issue.

25 Oct. 1744, cor. Hardw. C.
Ex parte Burton, 1 Atk. 256.

12. If a bankrupt after his discharge applies to an old creditor to lend him a new sum of money to carry on his trade, or to be his security for any office, this is a good consideration for his giving a bond for the remainder of the old debt, and the whole may be proved under a second commission.

6 Nov. 1745, cor. Hardw. C.
Walker and others v. Burrows,
1 Atk. 93-4.

13. The consideration in a deed of 5 s. and other valuable considerations, does not oblige the court to hold it to be for a valuable consideration, for it can at most but let the party into a proof that there were other valuable considerations.

4 May 1747, cor. Hardw. C.
Blount v. Doughty, 3 Atk. 484.

14. A father made a will, and considering the particulars of his estate, he gave a considerable legacy to his son, requesting him to give his two sisters 1000*l.* each on their marriage. The son gave his sisters two bonds accordingly, and died indebted. Lord Hardwicke said, the court could not tell if these bonds tallied exactly with the sum given for them, or measure the consideration of debts of this kind by exact rules of proportion of value; nor did it require that the consideration should be commensurate to the value of the estate; but if such a contract was fairly entered into without any circumstances of fraud, it has been held as made

* In many cases a request has been construed to amount to an absolute devise. *Vide* note to Harding v. Glynn, 1 Atk. 470. 3d edit.

Vide Newstead v. Searle, 1 Atk. 263. Stiles v. Attorney-General, 2 Atk. 152.

§ 1. *Lawful, and not relievable against.*

C—o 233

made for a valuable consideration, though when, ever the court sees a consideration made up with a view to defraud creditors, the court will lean against it, and reduce it to what is just and equitable. In the present case the court decreed the sisters should be admitted creditors for a valuable consideration to the full extent.

Vide Bell v. Scott, 2 Lev. 70.

Where a son taking beneficially by a father's will promises to make it good, this is not fraudulent, but may be a valuable consideration for a bond.

Vide Thynn v. Thynn, 1 Vern. 296.

So a promise under age may be a consideration for a promise when of age, and it has been so held at common law.

Vide Brooke v. Galley, 2 Atk. 34. Smith v. French, 2 Atk. 245.

15. Where a consideration of love and affection only is mentioned in a deed, and it is not said for other considerations, no proof of other considerations can be entered into, for it would be contrary to the deed. Otherwise, where no consideration at all is mentioned in the deed.

28 Oct. 1748, cor. Hardw. C.
Peacock v. Monk, 1 Ves. 128.

16. *A.* borrows money of *B.*, and gives him a draft upon a fund due to *A.* out of the Exchequer, and then becomes bankrupt. This is an assignment of the property to *B.* for a valuable consideration, and shall prevail against the assignees under the commission.

27 Nov. 1749, cor. Hardw. C.
Row v. Dawson, 1 Ves. 331.

17. A deed in consideration of love and affection, is good without livery, by way of covenant to stand seised; because that does not operate by transmutation of possession, but the use remains in the grantor until taken out of him by force of the consideration.

25 Mar. 1751, cor. Hardw. C.
Rigden v. Vallier, 2 Ves. 255.

18. The court will not set aside a purchase of a reversion merely on a suggestion of under-value, after the event has taken place, if no fraud or imposition appears.

10 July 1752, cor. Hardw. C.
Nichols v. Gould, 2 Ves. 422.

19. *A.* gave *B.* a promissory note for 610*l.*, as the difference in some stock-jobbing transactions. *B.* indorsed the note to *C.*, to whom he was indebted in a larger amount, and *C.* gave *B.* credit for the value in account. Held, that *C.* was a *bonâ fide* holder of the note, and not affected by the consideration for which it was originally given.

25 Mar. 1753, Dom. Proc.
Dunbar & al. v. Wilton,
6 Bro. P. C. 6.

20. When

M. 1764, cor. Northington, C.
Wright v. Englefield & al.
Amb. 468 1 Eq. Abr. 61.
Vide Wright v. Cadogan, 6 Bro.
P. C. 156. which seems to be
 S. C. affirmed in Dom. Proc.
Vide Bramhall v. Hall, Amb.
467. in which case the considera-
 tion was not meritorious, the feme's conveyance being to the use of her natural son.

26 Feb. 1776, cor. Bathurst, C.
Bullock v. Sadler, Amb. 764.

Vide Basset v. Nosworthy and
Mildmay v. Mildmay, cited from
Lord Northington's MS. notes.

M. 1778, cor. Thurlow, C.
Stephens v. Ld. Bateman,
1 Bro. Ch. Ca. 22.

14 July 1786, cor. M. R.
Stephens v. Olive and Un.
2 Bro. Ch. Ca. 90.

M. 1786, cor. Thurlow, C.
Colman v. Sarel,
3 Bro. Ch. Ca. 12.

20. When the consideration is meritorious, as in the case of a provision for children, the court will assist the defect of an intended legal conveyance against the heir; but in many instances, where the consideration is not meritorious, the court refuse to assist such defect.

21. A. purchased a reversion worth 1200*l.* for 200*l.*, which he *bonâ fide* paid upon a bill to impeach this purchase. It was contended, that the defendant ought only to hold the estate as a security for the 200*l.*; but Lord Chancellor said, the question was not, whether the consideration was adequate? but whether it was valuable? For if it were such a consideration as would not be deemed fraudulent within the statute of *Elizabeth*, it ought not to be impeached in equity. Bill dismissed without costs.

22. Equity will not set aside a deed entered into by parties apprised of their rights, in order to put an end to a suit, although upon inadequate consideration.

23. On a deed of separation, the trustees indemnifying the husband against the wife's future debts is a valuable consideration, and takes the conveyance out of the statute.

24. Wherever a voluntary deed is not sufficient to pass the subject out of the conveyor, it never can be carried into execution; and a court of equity will not carry such deed into execution, unless it be supported by a valuable, or at least what the court calls a meritorious, consideration; such as payment of debt, or making provision for a wife or child.

SEC. 2. Of unlawful and invalid Considerations, against which Equity will relieve.

H. 1660, cor. Lds. Comrs.
Dyer v. Tymewell, 2 Vern. 123.
 If the charge in the plaintiff's bill has been confined to the obtaining of the bill of exchange by surfs, the court would not

1. **D**EFENDANT obtained from plaintiff a bill of exchange by fraud, and upon pretence of a demand that was fictitious, and had nothing of realty in it. The bill expressed to be for value received, but defendant admitted by his answer that

§ 2. Unlawful, and relievable against.

C—o 235

that no money passed. Decreed the defendant to pay principal, interest, and costs.

have relieved, but left him to his remedy at law.

2. Defendant and his attorney, by fraud and misrepresentation, obtained from *A.* a conveyance of her estate, and prevailed on her to levy a fine also. No consideration was paid; but friendship was set up as a consideration. Upon a bill by the devisee of *A.*, the court decreed a conveyance of the estate from defendant to the devisee, subject to the debts of the testatrix.

M. 1693, Canc.
Wilkinson v. Brayfield,
Woodhouse v. Brayfield,
2 Vern. 307.

3. *A.* was bound as a surety in a recognizance, dated 5 May 1660, for payment of money which happened not to be made good by the convention act for confirming judicial proceedings, the act not extending to that day. *A.* being a surety only, and having no consideration for entering into this recognizance, the court would not make it good against his estate, nor allow it to be so much as a debt.

M. 1700, cor. Wright, C. S.
Sheffield v. Lord Castletown & Un.
2 Vern. 393.

4. Tenant in tail made a lease to *A.*, in consideration of his procuring a marriage between the lessor and a lady of fortune. Held, that this consideration was fraudulent, and the lease accordingly set aside.

29 Jan. 1703, Dom. Proc.
Scribblebill v. Brett;
1 Bro. P. C. 57. 2 Vern. 445.
Prec. in Ch. 165.
2 Eq. Abr. 585. pl. 1.
10 Vin. Abr. 206. pl. 27.
Vide post, tit. Marriage Brocage.

5. Defendant as trustee for the executrix of one *Fowler*, gave a note for a share in the *Affento* mines. It was disputed whether plaintiff should be left to law upon this note, for that the mines were a bubble, undertaken by plaintiff, and whether defendant could give the want of consideration in evidence under 3 & 4 Ann. c. 9. The judges were divided in opinion; but an injunction was granted on terms, defendant agreeing to give judgment and release of errors, subject to the order on hearing.

M. 1722, cor. King, C.
Brown v. Marsh,
Gilb. Eq. Rep. 154.
Vide 1 Salk. 125. 4 Mod. 242.
244.

6. A pauper 72 years of age conveyed lands of 40 *l.* per annum in consideration of an annuity of 20 *l.* for his life. He lived but two years after. Upon a bill by the heir at law this conveyance was set aside at the Rolls, it appearing that the old man was weak, and easily imposed upon; and his Honor's decree was afterwards affirmed by Lord *Maclesfield*.

M. 1723, cor. M. R.
Clarkson v. Hawway,
2 P. Wms. 203.
2 Eq. Abr. 482. pl. 22.
510. pl. 2.

No proof was offered in this case that any instructions were given by the old man to draw the conveyance, or that the contents of it were ever read to him,
Vide *White v. Small*, 3 Ch.

Ca. 103. *Bennet v. Wade*, 2 Atk. 324. *Evans v. Blood*, 4 Bro. P. C. 557. *Bridgman v. Green*, 2 Vef. 627. *Filmer v. Gott*, 7 Bro. P. C. 70. which are cases of the same nature.

7. Where

H. 1743, Canc.

Evans v. Hopkins and another,

9 *Mod.* 83.

2 *Eq. Abr.* 88. pl. 10.

Vide 2 *Com. Dig.* tit. Chan-
cery (2 T. 11.) *Coleby v. Smith,*
1 *Vern.* 206. *Wilkinson v.*
Brayfield, 2 *Vern.* 307. *Nichols*
v. Nicholls, 1 *Atk.* 409. *Young*
v. Peachy, 2 *Atk.* 254. *Evans*
v. Llewellyn, 2 *Bro. Ch. Ca.* 150.
et vide post, tit. Deeds, Fraud, Heir, catching Bargains.

P. 1731, in Scacc.

Parry v. Hughes,

2 *Eq. Abr.* 54. pl. 12.

* *Quare,* if it was not the
covenantor who had no issue, and
whose wife was dead, as stated in
the text?

(a) But it would have been
otherwise if such covenant had been
in favor of children, creditors, or any such other good consideration; for though the making the agreement
was voluntary, yet the cause of the motive inducing to it would be valuable and good. So in favor of a pur-
chaser, the seller, after purchase, being considered only as a trustee for the purchaser. S. C.

22 Feb. 1742, cor. Hardw. C.

Fitzer v. Fitzer, 2 *Atk.* 513.

(b) *Vide* *Middlecome v. Mar-*
low, 2 *Atk.* 521. where Lord H.
said, "the court never weighs nicely the particular advantages of a settlement on either side, if it be
"just in general."

7 July 1749, cor. Hardw. C.

Dibbenham v. Ox, 1 *Ves.* 276.

9 July 1755, cor. Hardw. C.
Bridgman v. Green, 2 *Ves.* 627.

7. Where a lease for years worth 200*l.* per ann. belonged to two coparceners, and one of them upon a false suggestion that a fine of 250*l.* was to be paid for the renewal of it, obtained an assignment of the other's moiety for a consideration of 20*l.* The court set aside this conveyance as fraudulent, and ordered the assignee to account for a moiety of the profits, and defendant to pay costs.

Heir, catching Bargains.

8. *Edward Parry* covenanted to convey all his lands (part being in mortgage) to himself and his wife for their lives, and to the heirs of the marriage, remainder to *Edward Parry*, plaintiff's father, in tail male, who was a stranger both in blood and consideration, and he having no issue*, (and his wife being dead,) devised the mortgaged premises to defendant, and died. Plaintiff brought his bill to have the covenant executed in favour of him, but it was dismissed (a).

8. Every voluntary conveyance by a husband is fraudulent against his creditors; and though he is bound by law to maintain his wife and children, yet the funds out of which the maintenance is to arise are liable to his creditors; yet Lord *Hardwicke* said, he would not weigh the considerations in deeds in too nice scales (b).

9. Bill for delivering up a bond given by plaintiff to defendant's wife, as a reward for her power and influence over plaintiff's grandfather, (an old man of 82,) that he should dispose of his whole estate for plaintiff's benefit, and give security that he would not alter his will so made. *Per Lord Chancellor*—This bond is new in specie, and differs from marriage brokerage bonds and bonds in fraud of marriage agreements, yet being given for an undue consideration, it must be delivered up, for it can receive no countenance in equity.

10. Plaintiff (an imprudent man and liable to be imposed upon) conveyed his estate to his servant on pretence of a qualification to kill game; though there

§ 2. Unlawful, and relievable against.

there was a formal livery of seisin the servant never was in possession, but paid rent to the plaintiff; the conveyance imported to be in consideration of 3500*l.*, but no money was ever paid or intended to be paid: upon a bill to set aside this conveyance, the servant set up his master's letter desiring that 3500*l.* might be inserted in the deed as a consideration; and he insisted on the estate as a gift from his master. *Per* Lord Chancellor—No conveyance for a valuable consideration can afterwards be set up as a gift. Many conveyances have been set aside on that ground. The present conveyance is attended with so many circumstances of imposition, that it is impossible it can stand. His Lordship therefore set aside the whole transaction, and directed an account.

11. *J. S.* purchased an estate of his aunt for 10,000*l.*, which was proved to be worth 20,000*l.* and upwards; but in the conveyance, the consideration of natural love and affection was added. Held, that this was a gross fraud upon the aunt, and the conveyance was accordingly set aside.

3 Feb. 1774, Dom. Proc.
Filmer Clerk and another v. Gott
Esq. 7 Bro. P. C. 70.

12. Equity will set aside leases for lives, obtained by the agents of a deceased person of weak intellects, upon inadequate considerations, as fraudulent.

12 Nov. 1783, cor. Lds. Comrs.
Gartside v. Igherwood and others,
1 Bro. Ch. Ca. 558.
Vide *Filmer v. Gott*, 7 Bro.
P. C. 70.

13. The court of chancery will not allow the indorsee of a bill of exchange, given to a broker in consideration of money paid by him for effecting illegal insurances, to prove such a debt under a commission of bankruptcy.

20 May 1797, cor. Loughb. C.
Ex parte Mutter, 3 *Ves. jun.* 373.

SEC. 3. In what Cases a Deed without Consideration shall be deemed good and effectual, and to what Purposes.

1. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration: so if a judgment be given in trust for a feme sole who marries, and by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if a feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under

T. 1733, cor. King, C.
Lord Carteret v. Paschal,
3 *P. Wms* 200. 4 Bro. P. C. 168.
Vide *Sir Edward Turner's case*,
1 Vern. 7. *Tudor v. Samyne*,
2 Vern. 270. *Parker v. Wyndham*,
Piec. in Ch. 419.

under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent.

P. 1740, cor. Hardw. C.
Harvey v. Harvey, Barn. 110.
 2 *Eg. Abr.* 670. pl. 21.

2. It was said by Lord *Hardwicke* in this case, that in aiding defective executions of deeds in favor of a wife or children, it has never been required that those deeds should be founded on any valuable consideration, in the strict sense of the word; but the deeds being in order to make a provision for a wife or children, it is sufficient.

As to what sort of consideration will raise a use by way of covenant, to stand seised, see *post*, tit. *Covenant, Trust, Use*.

Where the consideration of a bond or contract is, that a woman shall cohabit with a man as his mistress; whether given in *præmium pudicitie*; or, *pro turpi causa*, see *post*, tit. *Seduction*.

For cases of deeds obtained by fraud, without any, or for very inadequate considerations, see *post*, tit. *Deeds, Fraud, Heir, catching Bargains*.

As to voluntary contracts, where good in equity, and by what considerations supported, see *ante*, tit. *Agreements, Bonds*; *post*, tit. *Deeds*.

Contempt.

SEC. 1. What amounts to a Contempt; how the same shall be punished; and to what Extent the Estate or Representatives of the Party in Contempt shall be bound.

P. 1688, cor. M. R.
Thompson v. Baskerville,
 3 *Cb. Rep.* 215.

1. PLAINTIFF was a second mortgagee, contesting the validity of the first mortgage; but not having made the mortgagor a party, he was ordered to pay five marks costs. Plaintiff amended his bill, and set down his cause as an original cause, and not by way of appeal. Plaintiff had not served the mortgagor with process, he being

§ 1. *What, and where punishable.*

C—o 239

being beyond sea; the court therefore would not hear the cause; for no contempt can be without service of a subpoena, and plaintiff ought to have the mortgagor's answer, or run out all the process of contempt to a sequestration.

2. If a man marries a lunatic when under the care of the committee of the court; this is a contempt for which the person marrying may be committed; and marriage is no superseas of the commitment, so as to take him or her out of the custody of the committee.

T. 1703, cor. Wright, C. S.
Mrs. Affe's case, *Proc. in Cb.* 203.
1 *Eq. Abr.* 278. pl. 6.

3. In this case the court granted an attachment against a man for his contempt in refusing to be examined by the sheriffs of *London*, upon the execution of an extent at the suit of the crown.

H. 1707, Scacc.
Regina v. Newell, Parker 269.

4. A decree was made against a tenant in tail who had agreed to sell his estate; he stood out all process of contempt for not obeying it, and died; yet his issue were held not bound, as he could only affect his issue by fine or recovery.

H. 1708, cor. Cowper, C.
Powell v. Powell,
Proc. in Cb. 278.

5. An infant was inveigled from *B.* her guardian, and married to *W.* Though the infant was not taken from a guardian assigned by the court, yet both *W.* and the parson, and the agents, were all committed by the M. R.; and the order was afterwards confirmed by Lord Chancellor *Harcourt*. Cited by Lord Commissioner *Jekyll*. 2 *P. W.* 112.

22 May 1713, cor. Harcourt, C. S.
Hannes v. Waugh,
2 *Eq. Abr.* 754. pl. 1.
In *Herbert's case*, 3 *Willf. Rep.*
117. S. C. cited *arguendo*, says,
that they were long in custody.
S. C. cited also by Lord C. Ta bot,
-M. 1734, in Lord Raymond's
case, *Ca temp. Talb.* 59. says,
all the parties were committed, it

being held a contempt of the court to marry a ward of the court without its direction. And the same would have been done in the case of *Hughes and Science & al.* Hil. Vac. 1740. but it did not appear in that cause that *Williams* the clergyman who married the infant to *Science* was at all party to the contrivance, and so had not incurred the censure of the court; whereas had he been privy thereto, the licence would not have protected him. *Vin. Abr. tit. Guardian.* P. 205. Note to Case 3.

6. Suing the bail below, while a writ of error is pending in parliament, is a contempt and a breach of privilege.

H. 1720, Dom. Proc.
Throgmorton v. Church,
1 *P. Wms.* 685.
2 *Eq. Abr.* 222. pl. 3.

7. An advertisement, that whoever shall discover and make legal proof of a marriage (in relation to which a suit was depending) shall have 100 *l.* reward. Held a contempt, and the party was committed.

M. 1720, cor. Parker, C.
Pool v. Sacheverel,
1 *P. Wms.* 675.

8. A sequestration was ordered *nisi* both against the Countess Dowager of *Shaftsbury* and the Countess of *Gainborough*, for their contempt in contriving

H. 1722, cor. Maclesfield, C.
Eyre v. Countess of Shaftsbury,
2 *Willf. Rep.* 110.
2 *Eq. Abr.* 710. pl. 3.

See this case stated at large, post, tit. *Guardian and Evidence*.

ing and effecting the marriage of the Earl of Shaftsbury, an infant, with the Countess of Gainsborough's daughter, without consent of his guardian named by his father's will; and without applying to the court.

On the 15th May following the Lords Commissioners before whom this matter was solemnly argued, gave their opinion that the sequestration against Lady S. ought to be made absolute; but forasmuch as the infant's guardian had not complained or prayed any relief against Lady G., the court would do nothing against her, but discharged the order of sequestration with respect to her.

The marriage of a ward, without the consent of the guardian, is a ravishment of the ward (a), and is severely punishable by statute of *Westm.* 2. c. 33. nor is there any thing against which the court shews more resentment, or is more jealous of, than the unlawful marriage of infants.

The court therefore has been induced to commit the parson and other agents concerned in the marriage of a lunatic (b), who equally with an infant was deemed an object of the protection of the court, so also the court has required the committee of an infant to enter into a recognizance that the infant should not marry without leave of the court (c).

(a) 2 Inst. 440. as to the punishment for contempt in marrying infant wards, vide Herbert's case, 3 P. Wms. 116.

(b) Vide Mrs. Ashe's case, Prec. in Ch. 412.

(c) Vide Davis's case, 1 P. Wms. 698.

(d) Vide Hannes v. Waugh, 2 Eq. Abr. 754 pl. 1.

(e) Vide Lord Raymonds case, Ca. temp. Talb. 58. Smith v. Smith, 3 Atk. 304.

And as the court will punish the instruments of such marriages without consent of the guardian (d), so if there be only an apprehension that an infant may be married unequally, the court will interpose and commit the infant to a proper person to prevent such danger (e).

And should the marriage of such an infant be procured to one of equal fortune and degree, yet being without the consent of the guardian, the offence is thereby constituted, and the equality can at most but tend to extenuate the fault.

P. 1722, cor Lds. Comrs.
Earl of Shaftsbury v. Shaftsbury,
Gilb. Eq. Rep. 172. 178.

In Gilbert's report of the principal case, he says, it was observed by the Lords Commissioners, that the contempt was not sworn upon Lady Gainsborough, whereas an order for a sequestration in the case of a peer is a judicial act of the court, and therefore must be upon a proper affidavit; and further, that the order is the judgment of the court,

§ 1. *What, and where punishable.*

C—D 241

court, and the sequestration is the execution of it, and therefore the judgment ought not to be founded on conjecture only; for if she be examined upon subsequent interrogatories, that will not make good the judgment of the court by a matter *ex post facto*.

9. Where an order is erroneous, a person ought not to be prosecuted for a contempt in disobeying it.

1 Feb. 1722, Dom. Proc.

Stone & al. v. Byrnes,

2 Bro. P. C. 399.

5 Vin. 452. c. 14. 2 Eq. Abr. 222. c. 5.

10. Two persons having authority to seize the effects of a bankrupt, broke open a closet where the bankrupt was, to search for them; two officers came soon after them, and took him in an action, and threw him into the Compter, where he was served with several other actions in custody. Ordered, that they (*i. e.* the officers) at their own costs should procure him to be discharged, or should stand committed, being an abuse of the process of the court.

M. 1726, cor. King, G.

Anon. Sel. Ca. in Ch. 64.

2 Eq. Abr. 127. pl. 1.

The name of this case seems to be *Gibbs v. Scudamore*.

11. All who are concerned in the private marriage of an infant under the care of the court of Chancery, are guilty of a contempt, though they are strangers to the order of guardianship.

M. 1729, cor. King, C.

Lug v. Elway, Mof. 31.

But the court will not set up an inquisition to find out who they are, nor examine the persons concerned as to who was the person that married her.

12. One of the guardians of an infant girl about 9 years old took her from a boarding-school, and married her to his own son, who was a barber's apprentice, and had no estate. The court ordered the guardian to produce the girl in court, and then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward so much to her disparagement, but held this to be no contempt, the ward not being under the immediate care of the court.

M. 1729, cor. King C.

Goodall & al. v. Harris & al.

2 P. Wms. 561.

2 Eq. Abr. 756. pl. 10.

13. Three persons being appointed guardians of a young woman by her father's will, one of them gets her (she being nine years old) married to his own son, who was seventeen. It was moved for an *hominie replegiando* against the father and son, that they should stand committed, and for an injunction to their receiving the rents of her estate. Lord C. King thought every part of the motion

M. 1730, cor. King C.

Anon. Fitz. Gib. Rep. 106.

2 Eq. Abr. 756. pl. 11.

VOL. II.

R

reasonable,

reasonable, but as to the first part ordered a speedier way, viz. to bring her body into court by a time certain, and made an order on the defendant for that purpose accordingly.

M. 1730, in Scacc.
Lord Berkley v. Varden,
Bunb. 290.

14. Where the time for answering is out, the defendant shall be deemed in contempt, though no attachment be sealed.

T. 1731, cor. Jekyll M. R.
Herbert's case, 3 P. Wms. 116.
2 Eq. Abr. 222. pl. 7.
756. pl. 13.

15. Marrying an infant ward of the court is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court.

3 P. Wms. 118. N.
Rex v. Harwood, 1 Vent. 178.
2 Lev. 32.

So where one, not a freeman of London, married a city orphan, though it did not appear that the party had any notice of his wife's being a city orphan, it was punishable by the court of orphans.

So executors are bound to take notice of judgments, though in the inferior courts of law, and therefore cannot pay bonds before such judgments, but at their peril. Off. Ex. Cap. 12.

Acts of court, as the commitment of a wardship, and in a cause then depending, must be taken notice of by every one at his peril in the same manner as a *lis pendens*.

M. 1732, cor. King C.
Ex parte Hopkins,
3 P. Wms. 154, 155.
Vide Eyre v. Countess of Shaftsbury, 2 P. Wms. 118.
Rex v. Smith in B. R. T. 7 & 8 Geo. 2.

16. Though the father has a right to the guardianship of his own children, and, if he can any way gain the custody of them, is at liberty so to do, provided no breach of the peace is made in such attempt; yet it will be a contempt in him, and much more in any other person offering to take them when going to or returning from the court of Chancery.

21 Jan. 1746, cor. Hardw. C.
Burton v. Mattons, 2 Atk. 114.
Barn. 401.

17. A minister of a parish who prevents an order for a defendant's appearance being published, pursuant to the 5 Geo. 2. c. 25. is indictable for a contempt.

20 Mar. 1740, cor. Hardw. C.
Hughes v. Science and others,
14 Vin. Abr. 203.
2 Eq. Abr. 756. pl. 14.

In this case an exception was taken that there was no *lis pendens*, no answer being put in; but the exception was over-ruled, and held that an infant is always under the care of the court if a suit be depending, and that after a bill filed it is a contempt to marry an infant without the consent of the court; and in this case there was not only a bill filed, but an attachment for want of an answer.

18. A bill being filed against J. S. for an account of an infant's estate, on a suggestion of waste, J. S. did not immediately answer, and an attachment issued. Pending these proceedings J. S. and one W. R. his counsellor and a justice of the peace, went to the Commons, where W. R. procured himself to be admitted guardian to consent to the marriage of the infant to J. S., and a licence was granted, and the marriage had accordingly, J. S. being 60 years of age, and the infant only 16. H. the infant's uncle petitioned that J. S. and W. R. should stand committed for procuring the marriage of the infant after the suit was commenced.

commenced. Ordered, that they should be committed close prisoners to the *Fleet*, that *W. R.* should be removed from the commission of the peace, that *J. S.* should be restrained from aliening the infant's property, and that all the securities belonging to the infant's estate should be brought before the court.

19. Where a husband by menaces prevails on a wife to put in an answer contrary to what she believes to be true, he may be punished for a contempt.

24 July 1740, cor. Hardw. C.
Ex parte Haffam, 2 Atk. 50.

20. A person keeping a commission of lunacy by him for several years, without putting it into execution, is a contempt of the court, and will be discharged with costs.

4 Aug. 1740, cor. Hardw. C.
Anon. 2 Atk. 52.

21. The pendency of a bill in Chancery relating to an infant's estate, is notice to all the world of the infant's being a ward of the court, so as to make persons concerned in the marriage of such ward, without leave of the court, guilty of a contempt, though they had not any actual knowledge of the infant's being such a ward.

6 April 1741, cor. Hardw. C.
Moor v. Moor,
Barn. Rep. in Cb. 407.
2 *Eq. Abr.* 757. pl. 15.
2 Atk. 157.

Mr. Atkyns in his report of this case says, "It is not barely
"having some hand in the trans-
"action of the marriage which
"will make persons liable to the

"censure of the court, but they must appear to have been concerned in the original contrivance of the
"marriage, and to have been apprised of the infant's being a ward of the court."

22. Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless partiality, corruption, or misbehaviour in the arbitrators be shewn.

6 Aug. 1742, cor. Hardw. C.
Lingood v. Croucher,
2 Atk. 395.

23. It is incumbent on courts of justice to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced before a cause is heard (a). The streams of justice must be pure and clear, that the suitors may proceed with safety to themselves and their characters.

3 Dec. 1742, cor. Hardw. C.
Anon. 2 Atk. 469.

(a) *Vide Baker v. Hart*, 2 Atk.
488. *Mrs. Farley's case*, 2 Vef.
520.

There are three kinds of contempts;—scandalizing the court—abusing the parties concerned in causes—and prejudicing mankind before a cause is heard.

The calling an advertisement in the *Gloucester Journal* a *bue and cry* after a commission of charitable uses, was held to be a libel in the printer; and the court committed him.

Printing a brief before a cause comes on is a contempt, if made use of to prejudice the world with regard to the merits of the case.

If a printer prints any thing libellous, it is no excuse to say he had no knowledge of the contents, though if the printer will discover who brought the paper to him, it may mitigate his offence.

Calling a person an *affidavit man* is libellous, for it means a man who is ready to swear on all occasions, without any conscience of the fact.

Whether a libel be public or private, the only method is to proceed at law, and Chancery has no cognizance of it, unless it is a contempt by abusing their proceedings.

22 Dec. 1744, cor. Hardw. C.
Ex parte Kerney, 1 Atk. 55.

24. Petitioner had been assignee under a commission of bankruptcy, but was removed by order of Lord Chancellor, who directed him to account and convey, &c. to the new assignee, which he did; but being an embarrassed man, he requested the commissioners to give him their summons, when he attended them, as a protection to him. On returning home from the commissioners he was arrested; and though he produced the commissioners' summons, the officer kept him in custody several hours, and treated the commissioners' summons with contempt. Lord Chancellor censured the officer for his conduct, and ordered him to give security for his attendance *de die in diem* to answer interrogatories, or that he should stand committed for his contempt. Lord Chancellor not knowing of any case in point, directed precedents to be searched, and recommended the officer to discharge his prisoner (a) in the mean time.

(a) Vide Ex parte Dick and
Ex parte Stow, 2 Blackst. 1142.

29 Feb. 1745, cor. Hardw. C.
Anon. 3 Atk. 297.

25. After the plaintiff at law had obtained judgment against P., and an award of execution on the *scire facias*, to revive a judgment P. obtained an injunction on the common terms of giving a *release of errors*, and afterwards brought a writ of error in the Exchequer-chamber; this is a breach of the order of the court, and also a contempt.

Where a release of errors is given immediately after judgment entered, and before the *scire facias* taken out, the words *had done and suffered* in the release must be confined to such actions, &c. as are already accrued, and bringing a writ of error on the *scire facias* would not be a contempt of the court.

After

§ 1. *What, and where punishable.*

C—o 245.

After the Exchequer-chamber have affirmed the first judgment, they have no authority, and a writ of error brought there, upon the award of the execution, would be no *superfedeas* (a).

Vide 1 Mod. 79, *Higtop v. Holt*, 5 Mod. 219.

(a) *Lloyd v. Skutt*, Dougl. 350.

In the principal case, the release being so long ago as 1731, the court would not consider the breach of the order as a contempt, but directed that the proceedings only on the writ of error should be stayed.

26. A general order of restriction affects every body, and whoever should marry an infant afterwards incurs a contempt of the court of Chancery.

24 May 1745, cor. Hardw. C. *Smith v. Smith*, 3 Atk. 306.

27. Though contemptuous words were spoken of a *subpoena*, and the person serving it severely beaten, yet as these facts were proved by the oath of a single person only, Lord Chancellor would not in the first instance order the offender to stand committed, unless the charge has been made out by the oaths of two witnesses; but made a rule upon him to shew cause why he should not stand committed.

14 June 1745, cor. Hardw. C. *Anon.* 3 Atk. 219.

Mr. *Edwards* the register said, he took it to be the rule of the court, that upon a motion for a commitment, the oath of two persons was necessary to prove contemptuous words upon serving the process of the court; but one was sufficient to prove a *battery* on the person by whom it was served. "Lord *Hardwicke*, however, doubted this "difference."

28. *Fecit* a sheriff's officer, and bail for the petitioner, a bankrupt, takes him away during the time of his last examination, and surrenders him in discharge of his bail; he prays to be discharged out of custody, and that *Fecit* may be censured for a contempt of the court. Lord Chancellor inclined to think that the bail's taking the principal coming to a court of justice to be examined, has never been determined to be a contempt of the court, provided they bring him to be examined by that court; and therefore dismissed the petition, but without prejudice to the bankrupt's application to the court of King's Bench.

22 Oct. 1747, cor. Hardw. C. *Ex parte Gibbens*, 1 Atk. 238.

Upon the subject of a bankrupt's surrender and consequent privilege, *vide* *Darby v. Baughan*, 5 Term Rep. 289. *Kenyon v. Solomon*, Cowp. 156.

This privilege extends to protect a bankrupt on an attachment for non-payment of money, as analogous to an execution, or process to enforce payment of a debt.—*Vide* *Ex parte Parker*, 3 Vef. jun. 554.

29. Where a person attends a cause to which he is a defendant, and had notice of the decree by

11 Aug. 1747, cor. Hardw. C. *Skip v. Harwood*, 3 Atk. 565. *Vide* next case and references.

being present when it was pronounced, if he does any act in contravention to it, he is guilty of a contempt, and liable to be committed to the Fleet.

M. 1747, cor. Hardw. C.
Anon. 3 Atk. 567.
Vide Pengree v. Jonas, 2 Bro.
Ch. Ca. 142.

(a) Skip v. Harwood, 3 Atk.
565.

18 July 1754, cor. Hardw. C.
Mrs. Farley's case, 2 Vesf. 520.

1 April 1756, cor. Hardw. C.
Butler v. Freeman, Ambler 301.

Vide Hughes v. Science, 2 Eq.
Abr. 756. pl. 14.

M. 1787, cor. Thurlow C.
Pengree v. Jonas,
2 Bro. Ch. Ca. 141.

T. 1792, cor. Lds. Comrs.
Call v. Mortimer,
4 Bro. Ch. Ca. 89.
Prac. Reg. 176. was cited in
favor of the motion.

M. 1795 in Scacc.
Smalleroke v. Lord Donnegal,
3 Anstr. 647.

30. It is no excuse for proceeding at law after an injunction is granted, that it was not sealed, for where a defendant or his attorney have been present, on an order for an injunction, and they have proceeded at law before it has been sealed, the court has considered it as a contempt, and committed the persons for it (a).

31. A publisher of an advertisement, as to proceedings in this court, was committed to the Fleet prison for contempt; but was discharged on submission, disclosing every thing, and paying the costs.

32. It is a contempt to marry a ward of the court, without leave of the court, though the father of the infant is living.

Mere filing a bill is sufficient to make an infant a ward of the court.

33. Upon a writ of error in *B. R.*, defendants in error, not having filed their original writ in due time, petitioned the Rolls that such writ might issue, and obtained an order accordingly, which order was neglected to be served. In the mean time plaintiffs in error signed judgment. Defendants moved that plaintiffs might stand committed for a contempt of the order at the Rolls, but Lord Chancellor refused to commit them, and only directed them to consent that the judgment should be set aside on a motion to be made in *B. R.*

34. Motion that defendant, who had been committed for a contempt in non-payment of money, should be committed a close prisoner for his further contempt in refusing to pay, and saying he supposed the attorney wanted to lay out the money in the funds. Motion refused.

35. Where an order *nisi* for a sequestration is obtained against a privileged person, he is not in contempt unless he neglects to obey the order *nisi*.

Such an order may be served on the defendant's clerk in court.

SEC. 2. Of the Contempt of Mesne Process until Decree, and of the Process for such Contempt.

1. A Sequestration which issues as mesne process, determines by the death of the party; otherwise, if it issues after a decree, though for a personal duty.

T. 1682, cor. Nottingham C.
Burdett v. Rackley, 1 Vern. 58.
Vide Anon. 1 Vern. 116.
University College v. Foxcroft,
1 Vern. 166.

2. By an order for time to answer, all contempts are not stayed unless it is so ordered.

M. 1682, Canc.
Anon. 1 Vern. 104.

3. Where a man is arrested upon an attachment, the contempt shall hold good, though no affidavit be filed at the time of taking out the attachment, if filed before the return of it.

T. 1683, cor. North C. S.
Anon. 1 Vern. 172.

4. One of the defendants is in contempt to a sequestration for want of an answer, and the cause is heard against the other defendant, yet he may come in and answer, and the cause may be heard again as to him.

H. 1684, cor. North C. S.
Philips v. Duke of Buckingham,
1 Vern. 218.

5. By the king's demise (a), all process of contempt not executed is determined, so that plaintiff must begin again at an attachment; but where any process is executed, and a *cepi corpus* returned, the process stands good.

H. 1684, Canc.
Anon. 1 Vern. 300.
(a) See *vide* Stat. 1 Ann. c. 8.
§. 5 which enacts that all such
process shall remain in force not-
withstanding the Demise le Roy.

6. Sequestrators on mesne process are accountable for the profits, and can retain only so far as to satisfy for the contempts.

T. 1684, cor. North C. S.
Gibson v. Scrovington,
1 Vern. 247.

7. Upon an affidavit that defendant was gone to Holland to avoid plaintiff's demand, and he having been arrested on an attachment, and a *cepi corpus* returned by the sheriff, the court on motion granted a serjeant at arms against him, and upon the return of that granted a sequestration.

M. 1685, cor. Jeffries, C.
Frederick v. David, 1 Vern. 344.

Note: When a *cepi* is once returned there is an end of all manner of process (for no proclamation or commission of rebellion goes after that); and though a messenger of late years has been usually granted in such cases, yet he is but a new officer, and subordinate to the serjeant at arms; but regularly in such case plaintiff should move that defendant may enter his appearance and be examined within four days, or stand committed.

8. An attachment sued out in the time of King Charles II. and executed at Exeter three days after his demise, before notice of his death, was adjudged to be well executed, and the proceedings thereon regular.

P. 1686, cor. Jeffries C.
Burch v. Maypowder,
1 Vern. 400.
Crew and Vernon, Cro. Car. 97.
Vaughan and Bampfield, temp.
North, C. S.

P. 1712, Canc.

Anon. Proc. in Ch. 331.

Note; In this case the bail bond was taken of a member of parliament.

H. 1718, cor Parker, C.

Anon. 1 P. Wms. 535.

Decreed to be within the stat. of 12 W. 3. c. 3. Vide Lord Clifford's Case, 2 P. Wms. 385.

T. 1718, B. R.

Paine's Case, 1 P. Wms. 439.

(a) Vide etiam, 5 Annæ, cap. 9.

M. 1719, in Scacc.

Jones v. Clement and another, Bunb. 50.

T. 1725, cor. King, C.

Anon. 2 P. Wms. 301.

(a) Vide Anon. 1 Vern. 116, where Lord North affirms that the officers of the city have no amerciaments.

(b) Vide Anon. Mos. 305. Anon. 2 Atk. 507. Wilkinson v. Belcher, 2 Bro. Ch. Ca. 181.

9. The sheriff cannot take a bail bond upon an attachment for not paying costs, but in such case a messenger must go to bring in the party.

10. The first process for contempt against a menial servant of a peer, is a sequestration *nisi*.

11. One Paine having obstructed the execution of Lord Chancellor Cowper's warrant, was committed to the Fleet for a contempt, and having removed himself to the King's Bench, he was let at large by the marshal; whereupon Lord Chief Justice Pratt granted his escape warrant, upon which Paine was taken and committed to Newgate. Paine moved to be discharged, contending that the statute of 1 Ann. cap. 6. (a), which gave escape warrants, spoke only of persons committed by any of the courts at Westminster for debt, or for contempt in not performing orders or decrees made in courts of equity; and that the statute did not extend to persons committed for contempts generally: the court of King's Bench considering this statute as a penal statute, and as such to be taken strictly, and not enlarged by equity, adjudged *seriatim*, that the escape warrant in this case did not lie. But there being an order in Chancery that Paine should be kept within the walls of the Fleet, the court made a rule that he should be delivered by the keeper of Newgate to the marshal of the King's Bench, from whence he had escaped, to be there closely confined according to the intention of the order in Chancery.

12. Commissioners of rebellion ought to take security from the defendant to appear, where it is upon the ordinary process of the court; but where it is upon an attachment, or contempt of an order, they ought not to take any security, but have the body in court upon the return of the commission of rebellion.

13. Where the sheriff has the amerciaments as in London (a), the course was to grant a messenger to bring in the body upon a *cepi corpus* returned; but now the practice is, to deny a messenger, and order the sheriff to bring in the body (b), else the sheriff to pay the plaintiff all the costs.

14. A sequestration *nisi* is the first process against a peer or member of the House of Commons; but if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient; yet the order for a sequestration shall not be absolute, but a new sequestration *nisi* shall issue (a).

court; but Lord Hardw. in *Büttler v. Raffield*, 3 Atk. 740. doubted the propriety of the rule, though he pursued it in that instance.

15. If a process for contempt issues for want of an answer, and plaintiff accepts the costs of the contempt, they are purged: and if an insufficient answer is put in by defendant, plaintiff must begin his process *de novo*; but if he refuses the costs, and upon exceptions to the answer, defendant is obliged to put in a further answer, plaintiff may go on with the process where he left off.

16. In this case an attachment for a contempt being taken out against one in *Ireland*, a commission was granted to examine him there, since he could not be examined in person to the contempt.

17. The attachment on which an order for a serjeant at arms is grounded, must be entered in the register's office, otherwise it is irregular.

18. A defendant being in custody for want of further answer, was discharged upon putting in a further answer, and paying the costs of his contempt; but should that further answer prove insufficient, Lord Chancellor said plaintiff may take up his process of contempt just where he left off, which would not be so if defendant were to lie in custody (b) until the master has reported the answer sufficient.

in custody, because of his

19. A plaintiff obtains an order, upon his own motion, to dismiss his bill with costs. The defendant, though in contempt for want of an answer, obtained an order discharging this order of dismissal. Held, that the first order was properly made, and agreeable to the daily practice of courts of equity; and the subsequent order was reversed.

20. After a *cepi corpus* returned, plaintiff cannot move that the sheriff may bring in the body, but for a messenger, and afterwards for a serjeant at arms.

21. Where

M. 1725, cor. M. R. abf. C.
Lord Clifford's Case,
2 P. Wms. 385.
2 Eq. Abr. 711. pl. 3.

(a) Goldborough the registrar said this was the course of the

T. 1728, Cane.
Haistwill v. Grainger,
1 Eq. Abr. 351. pl. 7.
Vide Anon. 2 P. Wms. 431.
which appears to be S. C.
Vide also Child v. Brabson,
2 Vef. 110.

M. 1728, cor. King, C.
Anon. Mos. 85.
Vide Anon. 1 Vern. 1874

M. 1731, cor. King, C.
James v. Philips, 2 P. Wms. 657.

18 Dec. 1750, cor. Hardw. C.
Child v. Brabson, 2 Vef. 110.

(b) Vide Dupont v. Ward cited, where Lord Chancellor was inclined that defendant should lie great obstinacy in not answering.

5 Mar. 1753, Dom. Proc.
Bateman and another v. Conway
and others,
5 Bro. P. C. 34.

P. 1787, cor. M. R.
Wilkinson v. Belcher,
2 Bro. Ch. Ca. 181.

13 Mar. 1790, cor. Thurlow, C.
Hale v. Shafto,
 3 Bro. Ch. Ca. 72.
Vide Gibson v. Scevington,
 1 Vern. 284. Desborough v.
 Crumby, Barn. 212. Wilcocks v. Wilcocks, Ambl. 421.

6 Aug. 1791, cor. Thurlow, C.
Carvil v. Smith,
 3 Bro. Ch. Ca. 362.

9 Dec. 1791, cor. Thurlow, C.
Crawley v. Clarke,
 3 Bro. Ch. Ca. 373.

M 1791, cor. Thurlow, C.
Pickery v. —,
 3 Bro. Ch. Ca. 372.

H. 1791, cor. Loughb. C.
Wallop v. Brown,
 4 Bro. Ch. Ca. 212. 223.

16 Jan. 1798, cor. Loughb. C.
Rogers v. Kirkpatrick,
 3 Vef. jun. 513.

21. Where goods are taken under a sequestration upon *mesne* process, they cannot be sold; that proceeding being only to found the further process of taking the bill *pro confesso*.

But where money is ordered to be paid, and the party is in contempt for non-payment, and thereupon goods are taken upon a sequestration issued for such contempt, the court will direct the sequestrators to sell.

22. In applying to the court for a sequestration for non-payment of money, the first motion is for a *sequestration nisi*.

23. Motion that plaintiff's solicitor, who had received a considerable sum more than his costs, and who had been served with an order to pay over the same, which he had not obeyed, should stand committed. Lord Chancellor stated the practice to be, that if an attachment be wanted, application must be made to the office; but if a more summary proceeding be required, the court must be moved that the party pay in the money by a *short day*, or stand committed; and his Lordship made such order in this case.

24. Defendant being in contempt for want of an answer, put in one which was excepted to; upon motion that she might be detained in custody till the master had made his report, the court discharged the defendant, and ordered the master to proceed on the exceptions *de die in diem*: and though 15 exceptions were afterwards allowed to defendant's answer, in this case, and she was in custody for non-payment of costs, the court, after payment of costs, would not detain her till further answer.

25. Where a defendant is in confinement under a sentence for felony, he cannot be brought up by habeas corpus, upon an attachment for want of answer, until the expiration of his sentence.

Of bills taken pro confesso where no answer can be obtained, vide Bill, f. 19, and stat. 5 Geo. 2. c. 25. Of the process for contempt after decrees, see Decree.

SEC. 3. How the Party in Contempt shall clear himself of the Offence.

1. IF one be taken up on an attachment, either in process or in execution after a decree, yet in both cases, on his appearing before the register, he is to be discharged and to answer the interrogatories at large, not in custody: and if he be continued in custody, the court, on motion and appearing before the register, will discharge him.

So if the sheriff take one upon an attachment in process, he is to give a bond of 40*l.* penalty to the sheriff, to appear and answer; but for one taken up in execution after a decree, the sheriff may insist on security proportionable to his duty: but in both cases, on the register's certificate that the party has appeared, the sheriff is to deliver up the bond. Agreed to by the registers, and ruled by the master of the rolls.

2. Upon a question, whether the defendant could be heard before he had cleared his contempts, though he offered to pay all plaintiff's demands, it was determined he could not; his application rejected, and a sequestration issued against his estates; and it was afterwards ordered, upon a further application to the court, that he bring before the master, principal, interest, and costs, and then be at liberty to move to have his sequestration discharged; but the sequestration not suspended in the mean time.

3. The general act of pardon (*a*), though with an exception of all contempts which had been prosecuted at the charge of a private person, held to extend to contempts in marrying infant wards; the contempt ending in the punishment of the party offending, and not in redressing the prosecutor.

4. In this case the court permitted a person who was in contempt to examine witnesses to fortify his denial of the contempt.

5. A defendant in contempt has leave to plead, answer, and demur; but if he prays time, he must enter his appearance with the register.

6. The

H. 1700, cor. M. R.
Danby v. Lawson,
1 *Eq. Abr.* 351. pl. 3 & 4.
Proc. in Ch. 110.

20 Feb. 1719, Canc.
Lord Wenman v. Oshaldifson, Bart.
& al.

2 *Eq. Abr.* 222. pl. 1.
5 *Vin. Abr.* 450. pl. 6.

Affirmed in parliament 11
Mar. 1719, 2 Bro. P. C. 140.

P. 1721, cor. Parker, C.
Phipps v. Earl of Anglesea,
1 P. Wms. 696.
2 *Eq. Abr.* 754. pl. 3.
(a) 7 Geo. 1. c. 29. s. 23.

M. 1727, in Scacc.
Wilkins v. Edson, Bunn. 244.

P. 1728, in Scacc.
Scarborough Corporation v. Jackson,
Bunn. 251.

T. 1728, cor. M. R.
Anon. 2 P. Wms. 481.
Vide Child v. Brabson, 2 Vef.
 110.

This appears to be the case of
Haitwell v. Grainger, 1 Eq.
 Abr. 351. pl. 7.

M. 1729, cor. King, C.
Long v. Elways, *Mof.* 50, 51.

H. 1730, cor. King, C.
Hill v. Biffel, *Mof.* 259.
Vide Earl of Suffolk v. Howard.

13 June 1731, Canc.
Anon. *Sel. Ca. in Ch.* 5.
 2 Eq. Abr. 69. pl. 7.

26 Nov. 1745, Dom. Proc.
Binjon Esq. v. Vernon Esq.
 4 Bro. P. C. 546.

27 Mar. 1746, cor. Hardw. C.
Maynard v. Pomfret, 3 Atk. 468.

H. 1793, cor. Loughb. C.
Wallop v. Brown,
 4 Bro. Ch. Ca. 212. 223.
 Lord Chancellor upon refusing
 this motion said, the practice in
 equity was analogous to the prac-
 tice at law, where a prisoner
 being once superfedable always re-
 mains so, and having once a right
 to go out cannot be detained, ex-
 cept for a new cause.

6. The defendant is in contempt to a serjeant at arms for not answering, and then puts in an insufficient answer; if the plaintiff's clerk in court accepts the costs, it purges the contempt, and the plaintiff must begin again with an attachment; but if the costs be not accepted, the plaintiff may go on in his process for contempt where he left off for further answer.

7. The court suffers persons to be examined on interrogatories, to purge themselves of a contempt, but never to bring themselves into a contempt.

8. One in contempt for not obeying an order may move to discharge it.

9. When a defendant is in contempt for want of an answer, and an insufficient answer is put in, that is no answer at all; and the plaintiff is not to begin his process *de novo*, but go on regularly from the last process.

10. Affidavits of a defendant's illness and incapacity to put in an answer, are admissible evidence on which to ground an application to discharge process of contempt, and receive the answer; though the suit be instituted in *Ireland*, and the affidavits sworn in *England*, and though a decree has been taken *pro confesso*, in consequence of the contempt.

11. Where a defendant, for want of putting in his answer, has stood out the whole process of contempt to a sequestration, and the bill taken *pro confesso*, on a decree against him *ad computandum*, the court will not discharge the sequestration on paying the costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the master to take the account.

12. A prisoner for contempt in not answering, must be discharged on putting in an answer, notwithstanding the same is excepted to, though the court will order the master to proceed on the exceptions *de die in diem*; and in this case defendant being kept in custody for non-payment of costs, after answer put in, could not (after payment of costs) be detained till further answer, though 15 exceptions

exceptions were allowed by the master to her first answer.

13. A defendant in custody for contempt was discharged on putting in his answer and depositing a sufficient sum for costs, subject to taxation.

P. 1793, cor. Loughb. C.
Broughton v. Martyn,
4 Bro. Ch. Ca. 296.

Copyhold.

C—o

Rules as to Copyholds.

WHERE the lord grants the inheritance of all his copyholds, the grantee may hold courts. *Benedicta est expositio quando res redimitur a destructione. Vide 4 Co. 26.*

Copyhold must be immemorial; therefore if a copyhold be leased by the lord for life, or years, according to the course of the common law, it shall never after be demised again according to the custom, for consuetudo semel reprobata non potest amplius induci. As continuance makes a custom, so discontinuance destroys it. Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est. Da. 33. Vide Coke's Copyhold Cases Rep. lib. 4. Calthrop's Readings of Copyholds.

A copyholder derives his estate from custom, and not out of the estate of the lord. 4 Co. 23. b. 24. a.

A copyholder is in by him who surrendered, and not by the lord. 4 Co. 27. b. 29. b. 28. b. And the lord is bound in conscience to hold a court to admit. 4 Co. Dy. 264.

Where copyholds can be granted in fee simple, they may be granted in tail, for life or years. Cui licet quod majus, non debet quod minus est non licere. 4 Co. 23. a. 30. a.

Copyholds shall not have any collateral qualities which do not concern descent. 4 Co. 22. b. 23. a. 30. b.

Copyhold descents are guided by the rules of common law; but customary inheritances have not the collateral qualities

qualities of freehold, nor doth a descent bar an entry.
Co. Copyh. c. 15. f. 50.

A fine levied of copyhold lands, and five years non-claim, bar both the lord and tenant. 5 Co. 124.
9 Co. 104. Touchst. 22.

Copyholds are not devisable by will at common law, for they do not pass by the will but by the surrender, and the will is only a declaration of the uses of the surrender, Touchst. 421. Co. Comp. Copyh. 83.
1 Bullstr. 200.

Neither will copyholds pass by a demise with other lands, unless particularly named. Touchst. 88. Co. Lit. 112.

Copyholders were formerly tenants at the will of the lord, their lands being parcel of the lord's demesnes, but now those copyholders stand on a surer foundation, if they perform those duties which their tenure requires; for if the lord turns them out, they may either sue a subpoena out of Chancery to be relieved, or have an action of trespass against the lord; for though they are tenants at the will of the lord, yet they are tenants at will, according to the custom of the manor, which the lord cannot break without reason. Co. Lit. 60. b. 61. a. 4 Rep. 21. 9 Rep. 79. Prescription, and that the lands are parcel of the manor, are incident to, and the very pillars on which every copyhold estate stands. 4 Rep. 24. 1 Inst. 58. b. Custom is the life and soul of copyhold estates; for if copyholders break their custom, they are subject to the lord's will. The customs of manors are so various, that it is impossible to ascertain them; they must however be time out of mind; they must be reasonable, according to common right; they must be upon good consideration; they ought to be compulsory, not left to the liberty of the tenant to observe or not observe them; they ought to be certain; they ought to be beneficial to the lord or tenant; and if there are not customs to direct copyhold estates, they must be directed by the rules of the common law. 1 Inst. 58. Co. on Copyh. 33.

SEC. 1. Of the Power of the Court of Chancery over Copyhold Estates, and where Relief has been given in Cases of Waste or Forfeiture.

1. AN issue was directed in this cause to try a special custom (a), and a verdict was found for defendant. As the point in question was of value, and concerned all the copyholders in the manor, Lord Chancellor granted a new trial.

2. A. having two new copyholds held of the manor of B. cut timber on the one, and employed it in repairing the other (b). The lord brought an ejectment at law, and recovered as for a forfeiture. Upon a bill the court relieved against the forfeiture upon payment of the costs at law and in equity.

ward of the lord should set out

3. Plaintiff brought his bill to be relieved against a forfeiture of his copyhold estate. He had been guilty of the greatest disobedience to his lord. After six presentments to repair, and an entry by the lord for the forfeiture, he brought an ejectment; and when on the trial a rule was entered into by consent, and made a rule of court, that upon payment of 4*l.* to the lord for his costs, and putting the estate into repair, he should be readmitted. He never complied with the rule, nor paid the costs, but brought an ejectment and was nonsuited; and after 10 years he brought his bill, though he had been several times amerced for not appearing at the court, and refusing to do fealty either upon oath, or (being a Quaker) upon affirmance. Lord Keeper thought he ought not to have relief, or if any, only upon payment of all costs, and putting the estate in repair, which would amount to more than his interest was worth, he having only a life estate. His lordship dismissed the bill with costs, declaring, that though this were a voluntary waste and forfeiture, (against which it was objected the court never gave relief,) yet the rules of equity were not so strict but that relief might be given, even against voluntary waste and forfeiture.

T. 1688, cor. Jeffries; C.
Edwin v. Thomas, 2 Vern. 75.
(a) *Quod vide* 1 Vern. 489.

H. 1705, cor. Wright, C. S.
Najib v. Lord Derby,
2 Vern. 537.

1 *Eq. Abr.* 121. pl. 19.
(b) It appears to have been agreeable to the custom that the timber should be so applied; but there seems to have been a dispute whether the bailiff or woodward of the lord should set out the timber assigned by the lord.

M. 1710, cor. Harcourt, C. S.
Cox v. Higford,
1 *Eq. Abr.* 121. pl. 20.
2 Vern. 664. S. C.
confusedly stated.

H. 1717, cor. Cowper, C.
Bishop of Winchester v. Knight,
 1 P. Wms. 406.
 2 Eq. Abr. 226. pl. 7.

(a) In *Jesus College v. Bloome*,
 3 Atk. 262. Ambl. 54 Lord
 Hardwicke dismissed a bill for a
mere account of timber cut down,
 as being the proper subject of an
 action at law; but his lordship
 added, that there were many in-
 stances where the court have de-
 creed an account in the case of
mines, which they would not have
 done in the case of *timber*, because
 the digging of mines is a sort of
 trade.

(b) *Vide Jesus College v.*
Bloome, *Curtis v. Curtis*, 2 Bro.
 Ch. Ca. 620.

4. A customary tenant opened a copper mine on the lord's estate, and dug and sold the ore, as did his heir after him. The lord brought his bill for an account. With regard to the tenant it was urged, that this was a personal tort, and died with the person, and that against the heir there could be no remedy, for that these customary tenants were as freeholders, who had used to sell timber and sell stone. Lord Chancellor thought it would be a reproach to equity to say, that a man might take another's ore or timber (a), and sell it in his lifetime, and that if he died there should be no remedy. As to the trespass in breaking up meadow or ancient pasture, it dies with the person; but as to the property in ore or timber, trover would lie for it in the hands of an executor, and the assents in his hands must answer for it, if sold; but the present case is stronger; for the tenant is a sort of fiduciary to the lord, and it is a breach of trust in him to take away the property of the lord. The executor in such case is clearly answerable (b). As to the evidence that a tenant may commit waste by cutting down timber, this may be by special grant, but it is no proof that a tenant may commit any sort of waste; as, to dispose of minerals, though a custom to dispose of coals may be evidence of a right to dispose of lead out of a mine. The plaintiff was recommended to bring trover in the present case, which he did; and it appearing upon the trial that no mine of copper had been before discovered in the manor, the jury could not find that the tenant had any right by custom to dig copper; and the court held, that these mines being new, the tenant could not without the licence of the lord, neither could the lord without the consent of the tenant, dig copper therein.

T. 1721, cor. Parker, C.
Sr Henry Peachy v. Duke of Somerset, *Pres. in Ch.* 568. 572.
 2 Eq. Abr. 227. pl. 9.
 1 Srs. 446.

See another point of this case,
 next section.

5. Plaintiff's father, a copyholder in fee, on his marriage surrendered to the use of himself for life, remainder to his first and every other son in tail male, remainder to himself in fee; but no admission was made on such surrender. The father made leases not warranted by the custom of the manor, and worked a quarry of stone from his freehold lands into the copyhold lands, and did both without a licence, and died. Afterwards plaintiff, his son and heir, cut down trees, and inclosed some of the copyhold lands, notwithstanding several repeated admonitions from the lord, who brought his ejectment,

ment, and had a verdict as for a forfeiture. On a bill brought for relief, *Macclesfield*, Chancellor, was clear of opinion that there was no foundation for equity to interpose; that it would be to alter the nature of the tenure and the term whereby copyholds subsisted; that if this was a forfeiture at law, a court of equity had nothing to do with it; and that it was like the case of a feoffment or fine levied by a particular tenant, against which there could be no relief (a). That copyholders were not tenants at will (b), though it were according to the custom of the manor; that this entirely differed from the case of a forfeiture for non-payment of rent or of a fine, for there the estate was but in the nature of a security for those sums; and the lord might be recompensed in damages and costs (c). That making a lease for years was a forfeiture, as it was a determination of his will; and though the lord should refuse to grant such licence, yet the tenant has no remedy, nor would this court compel the lord to grant such licence. That though these copyholds are mended by time, and are in the nature of an inheritance, yet still the tenant is obliged to observe the law and custom to which they are subject. That these customs are in the nature of the limitation of an estate, which determines upon the breach of them, and that unless there were some equitable circumstances in this case this court cannot interpose, which would be to repeal and destroy the law.

In this case, there can be no compensation; and it is the recompence, which is the true foundation of relief in equity in such cases. *Per Lord Chancellor, ib.*

In this case were cited *Cox v. Higford*, 3 Vern. 654. (but better stated in 1 Eq. Abr. 121. pl. 20.) where Lord Harcourt would not relieve against a forfeiture of a copyholder, even for permissive waste in letting a copyhold house tumble down for want of repair; but in that case the reason was because it was an absolute refusal to repair for many years together, after repeated admonitions and presentments of the jury, and therefore it was equal to a voluntary waste. And the case of *Cudmore and Raven*, (cited in *Cox v. Higford*,) where a quaker refusing to swear fealty, the lord seized as for a forfeiture; yet upon the circumstances of the case the court gave relief. Likewise were cited 1 Rol. Abr. 854. *Owen*, 641. *Leon*, 126. 2 Vent. 352. *Co. Litt.* 51. 63. and the case of *Nath v. Lady Derby*, (2 Vern. 537. 1 Eq. Abr. 121. pl. 19.) where *Wright, C. S.* gave relief against a forfeiture for cutting down timber by a copyholder; but the reason of that case was because the timber was employed about the repairs of the copyhold, and there was only a mistake whether the steward or the woodman should set out the timber. Note also; The principal case held three days, and was solemnly debated; but as to the principal point, whether the court could relieve against a voluntary forfeiture, Lord Chancellor was clear it could not, and that it would alter the very law of copyholds, which, though now supported by custom, were at first established by act of parliament, as all other parts of the common law were, till the records of them came to be lost, though against a forfeiture for permissive waste only, relief may be given.

Vide Lady Whitstone v. Sainsbury, *Prec. in Ch.* 591. also in 2 P. Wms. 146. *nomine Lady Whitstone v. Sts. Bury*, with the sequel of it on a rehearing, *Max. in Eq. Max.* 2 c. 3. S. P. *Max.* 12. c. 1. S. P. 1 Ch. Ca. 95, 96. S. P. *Ex contra Cox v. Higford*, 1 Eq. Ab. 121. pl. 20. but the editor of *Prec. in Ch.* (Mr. Finch) says this was *obiter* only, and not the point decreed in that case.

From the report of the principal case in *Stra* 455. It appears that the Lord Chancellor considered the making a lease of copyhold lands to amount only to a forfeiture of the part demised, as in the case of a feoffment by the tenant, it has been held that that part of which it is made is alone forfeited thereby. *Fuller v. Jerry*, 1 Rot. Abr. 509. 65. There is a *distum*, however, in 4 Co. 27. c. that all the copyhold which is held by the same tenure shall be forfeited by a feoffment of part. But if the Chancellor had

(a) *Vide Lady Whitstone v. Sts. Bury*, 2 P. Wms. 147. S. C. cited. *Nath v. Lady Derby*, 2 Vern. 537. S. P. *Sed vide Willis v. Fineux*, *Prec. in Ch.* 108. cont.

(b) Copyholders hold *ad voluntatem domini*; but that must be *secundum consuetudinem manerii*, *Co. Litt.* 60.

Copyholds were at first but a kind of tenure in *willenage*, and in respect of their base nature were determinable at the will of the lord, though now indeed they have been supported and hardened by time. *Per Lord Chancellor*, *Mich.* 1 Geo. 1. *Gilb. Eq. Rep.* 110.

(c) The true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money, and the court gives the plaintiff all that he expected or desired; but against such penalties or forfeitures, as in the pre-

been decidedly of opinion that any of the other acts alleged to have been committed had amounted to a forfeiture at law, they being in the nature of waste, the whole copyhold would have been forfeited. 1 Rol. Abr. 309. L. 15. 3 Com. Dig. tit. Copyhold, (M. 5.) 206.

6 Dec. 1724, cor. King, C.
Edwards v. Heather,
Sel. Ca. in Ch. 3.
2 Eq. Abr. 23. pl. 23.

6. Plaintiff sold defendant a copyhold estate of 16l. *per annum* value (on which was timber of 150l. value) for 630 l., and covenanted to surrender on or before *Michaelmas* then next. Defendant paid 10l. earnest, entered on the premises, and cut down timber, stocked the land, and acted as owner. On a bill for specific performance of covenants, plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before *Michaelmas*, and attended accordingly. On defendant's part it was proved that he was disordered in his senses; and though there was no proof of the timber's value, yet as no custom was alleged of the tenant's having power to cut it down, it must have been according to the common law, by which the tenant has no power over it; and therefore a plain imposition. Lord Chancellor was of opinion that it was a great over-value, and that his cutting down timber was a proof of his folly, being a direct forfeiture; but said it was a matter merely at law. If the surrender had been made, an action would have laid at law. Bill dismissed.

H. 1725, Seacc.
Attorney-General v. Vincent,
2 Eq. Abr. 378. pl. 9.
Bunb. 192.

7. A copyholder cut down more timber than he could justify; and a bill being brought against him for a discovery, he demurred, because it would subject him to a forfeiture, as being waste; and the demurrer was allowed.

M. 1741, Dom. Proc.
Smith ex dem. Damer v. Packhurst,
3 Atk. 141.

8. A lease made by a copyhold tenant is void against the lord, and yet is a forfeiture as to the tenant.

15 Nov. 1742, cor. Hardw. C.
Clayton v. Cooke, 2 Atk. 449.
(a) If the tenants be infants
the stat. 9 Geo. 1. c. 29. f. 1.
has chalked out a method how to proceed.

9. After proclamations made on so many court days, if the copyholders do not come in to be admitted, the lord may seize upon their lands (a).

3 Aug. 1749, cor. Hardw. C.
Ex parte Butler and another *Assignees*, 1 Atk. 216. Amb. 73.

10. When the legal interest in a copyhold is in one person, and the equitable interest in another, the court can order the trustee who hath the legal interest to surrender, though the cestui que trust refuses.

19 June 1751, cor. Hardw. C.
Pawcett v. Linsither, 2 Vef. 301.

11. A custom for a copyholder *for life* to commit waste, is bad; but it is good for a copyholder *in fee* to do so.

SEC. 2. Of the Devise of a Copyhold Estate (duly surrendered to the Use of the Will) where the same shall pass, though the Will be not executed according to the Statute of Frauds and Perjuries.

1. A Copyhold surrendered to the use of a will, has been adjudged to pass by a will attested by two witnesses, or by one only (a); and Lord Chancellor in this case said, that as it has been so determined, though he would not carry the resolution one jot further, *he would not shake any settled resolution touching property or the title of land*, however ill-grounded the first determination might be, otherwise his lordship would have thought it more reasonable to say, that in case of a surrender to the use of a will, the will should be executed in such manner as by the act of parliament a will of lands (b) ought to be executed. In other cases of copyholds the lands pass by the surrender, and the will is only a declaration of the uses of the surrender, but a trust of an inheritance (as in the present case) cannot be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if it were otherwise, the same inconveniences would be introduced as were occasioned before the statute of frauds by a devise of a legal estate in fee simple.

In the principal case testator undertook to devise the land in question, as owner, without referring to the deed of trust, or any relation to his pretended power, which made it like the case cited from 1 Inst. 111, 112.

proved as a testamentary paper, was sufficient to pass copyholds which the testator has before surrendered to the use of his will.

Decreed, the will in the principal case void, and the trustees to convey to the heir at law of the testator.

Memo. In Hil. vac. 1727, in a cause at the Rolls, M. R. admitted it to be settled, that where a copyhold is surrendered to the use of a will, there need not be three witnesses to such will, because the copyhold passes by the surrender and not by the will; yet a trust or equity of redemption of a copyhold

M. 1724, cor. Macclesfield, C. *Wagstaff v. Wagstaff*, 2 P. Wms. 258. 261. 2 Eq. Abr. 232. pl. 14. 763. pl. 12.

(a) *Vide* Tufnel v. Page, Barn. 9. and 2 Atk. 37. where Lord Hardwicke determined that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest.

And in Attorney-General v. Andrews, 1 Ves. 225. Lord Harcourt determined that a copyhold devised to a charity and not surrendered to the use of the will was good, notwithstanding the statute of frauds, it amounting to a direction to the heir to make the surrender; and it was also held good as an appointment under 43 Eliz. by which a devise in tail, though no recovery, is good.

(b) Longford v. Eyre, 1 P. Wms. 741.

So in Carey v. Askew, 4 Bro. Ch. Ca. 58. Sir Lloyd Kenyon, M. R. abs. C. determined that a mere devise of a will, the signing and publishing whereof were prevented by the sudden death of the testator, yet being

(a) *Vide Tufnel v. Page*,
Barn. 12. 2 Atk. 37.

hold cannot pass by a will, unless attested by three witnesses (a), for there can be no surrender to the use of the will to pass such trust, and the trust and equity of redemption of all lands of inheritance are within the statute of frauds; and it is no prejudice to the lord of the manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate of the copyhold is tenant to the lord, and liable to answer all the services.

12 July 1725, cor. Lds. Comrs.
Apleyard v. Wood,
Sel. Ca. in Ch. 42.
2 Eq. Abr. 763, pl. 13.
232. pl. 13.

Lord Chancellor seemed to be of opinion that the devise of a trust must ensue the nature of the estate, and not make it necessary to have three witnesses, as the copyhold might be devised without three witnesses; but this may be a question to be determined when the issues are tried. 1b—8 Vin. Abr. 129. pl. 4. S. C. is thus stated: *A* seised in fee of copyhold lands, makes a surrender to the use of *B* and *C* and their heirs to the use of his will, and devises the lands to *D*. Parker, C. was of opinion, that the circumstances required by the statute (29 Car. 2.) of frauds in devises of lands ought to be observed in this case, for by this surrender the fee of the copyhold was in the surrenderees, and only a trust devised by the will, which cannot pass by the devise without the circumstances required by the statute of frauds.

2. A surrender was made of a copyhold estate to trustees, to the use of the will. A will was made with only two witnesses to it. It was admitted, that a will of a copyhold estate does not require three witnesses; but this is a devise of a trust relating to lands, so within the very words of the statute of frauds. The heir controverting the surrender and the will, this point was not determined, but two issues ordered.

28 April 1740, cor. Hardw. C.
Tufnel v. Page, 2 Atk. 37.
2 Eq. Abr. 236, pl. 25.
298. n. 2.
Barnard. Rep. 9.

3. *W. S.* made his will and signed it, but it was not attested by witnesses. As the testator had not surrendered his copyhold estate, the question was, Whether that passed? The court held it did; for the statute of frauds and perjuries relates to such estates only as pass by 34 & 35 H. 8. which takes in fee simple only, and does not extend to customary estates.

Vide Attorney-General v. Bains,
2 Vern. 597.

Where a man is seised of copyhold lands, and surrenders to the use of his will, and executes a will, though it is not attested by witnesses, yet it shall direct the use of the surrender (b).

(b) *Attorney-General v. Sawt. 1*,
2 Atk. 497. *Attorney-General*
v. Andrews, 1 Ves. 225. *Carey v. Askew*, 2 Bro. Ch. Ca. 58. *Harg. Co. Litt.* 111. b. n. 1. but a customary freehold, where there is no custom to surrender to the use of a will, can only pass by a will attested according to the statute of frauds. *Husley v. Grills*, Ambl. 299.

Where the legal estate is in trustees, as the customary trust cannot surrender the copyhold lands to the use of his will, they will pass by his will only (c).

(c) *Car v. Ellison*, 3 Atk. 75.
29 June 1769, cor. Camden, C.
Georvin v. Kilpha, Ambl. 684.
Vide Toller v. Toller, 2 P.
Wms. 489. *Cotter v. Laver*, 2 P.
Wms. 684.

4. Testator surrendered his copyhold estate to the use of his will, to be attested by three witnesses. He made his will, but it was not attested by any witness, whereby he devised his copyhold estate. Held it did not pass.

§ 2. *Where devisable by Will not duly executed.* C—O 261

5. A copyhold surrendered will pass by a will, P. 1786, cor. M. R. abf. C.
not attested according to the statute of frauds. *Carey v. Ashew,*
2 Bro. Ch. Ca. 58.
Vide Tufnel v. Page, 2 P. Wms. 262. (n).

But it will not pass without surrender.

6. A. by will duly executed and attested, gave certain interests in his real estate to certain uses, and in default of the persons to whom given, he gave the same to such uses as he should declare by any deed executed in the presence of two witnesses. By deed poll attested by two witnesses, he declared further uses. Held, 1st, That the deed poll was a testamentary act: 2dly, That it did not pass the freehold estate, because not executed according to the statute of frauds: and 3dly, That it should pass the ultimate use of the copyhold, as declaring the trusts of the surrender.

S. T. Milbourne v. Milbourne,
2 Bro. Ch. Ca. 64. 1 Eq. Abr. 124.

4 July 1793, cor. Loughb. C.
cum assit.

Vincent v. Stanfield,
4 Bro. Ch. Ca. 353.
2 Ves. jun. 209.

*Vide The report of a case made
and sent to B. R. 5 Term Rep.
92.*

For cases of copyholds devised without a previous surrender to the use of a will, see next section.

SEC. 3. Of the Surrender and Admission, and in what Cases a defective Surrender or the Want of a Surrender will be supplied in Equity.

1. A Surrender defective by reason that it was made into the hands of one customary tenant only, was in this case supplied in equity, testator having made a provision for his younger children out of the lands in question.

H. 1682, Canc.
1 Eq. Abr. pl. 122.
Hardham v. Roberts, 1 Vern. 132.
Vide 1 Salk. 187. 1 Ch. Ca. 171.

2. A man may devise an equity of redemption of a copyhold estate, without surrendering it to the use of his will.

M. 1682, Canc.
Brent v. Best & al. 1 Vern. 69.

3. Plaintiff had enjoyed a copyhold estate forty years under a will, but no surrender to the use of that will could be found; whereupon he filed his bill to have the defect of the surrender supplied in equity. Lord Keeper was clear that the want of the surrender should be supplied, but, as in the present case, the will itself was contested, and the sanity of the testator called in question; and as the defendant was an infant eighteen years of the forty, Lord Keeper decreed the defendant to admit a

M. 1683, cor. North, C. S.
Lyford v. Coward,
1 Vern. 195.

surrender, and directed an issue to try the will; but it was afterwards agreed that the whole matter should be tried in ejectment, and the plaintiff not to insist on his length of possession.

H. 1685, cor. Guildford, C. S.
Allen v. Arms, 1 Vern. 365.

4. A voluntary surrender made by a man in his sickness was held good against his wife and children, who claimed under a subsequent surrender made upon his marriage after his recovery of that sickness.

H. 1686, cor. Jeffries, C.
Diamond v. Hicks, 1 Vern. 433.

5. In consideration of a marriage intended to be had betwixt two copyholders, the man surrendered his copyhold to the use of him and his intended wife, and the survivor of them; and the woman in like manner surrendered her copyhold to the like uses: the man died before the marriage, and the woman entered and enjoyed for 30 years. Declared a trust; and a re-surrender and account of profits decreed from the death of the man.

H. 1686, cor. Jeffries, C.
Spindler v. Walsford, 2 Vern. 16.

6. *A.* surrendered a copyhold tenement to the use of *B.* and his heirs, on condition that *B.* and his heirs should pay to *C.* and his heirs 5*l.* for ever, and in default of payment, the use to *B.* and his heirs to be void, and to be to the use of *C.* and his heirs. *B.* was admitted, and there were several alienations by surrender and admittance, and there were also several alienations of the 5*l.* rent, which had always been done by surrender and admittance on assigning the rent. Upon a bill by the last surrenderee of the rent against the tenants in possession; decreed a good alienation in equity, being for a valuable consideration, and that defendants should pay the arrears.

H. 1689, cor. Ld. Comrs.
Beck v. Andrews, Pres. in Ch. 1,
2 Vern. 120.
2 Eq. Abr. 230. pl. 2.

7. *A.* purchased a copyhold to himself, his wife and daughter, and their heirs, and afterwards surrenders it to *B.* and his heirs, for securing a debt due to him. *B.* brought his bill against the wife and daughter after the husband's death, to set aside their estate as fraudulent against him, who was a purchaser. This purchase is an advancement for the wife and daughter, and they are not trustees; and the husband and wife (as one person) take a moiety by intireties; and therefore the surrender of *A.* can pass no part of the lands; and it being copyhold, the plaintiff might have informed himself how the title stood. The husband and wife taking by intireties, he could not alien or dispose of

§ 3. Defective or Want of Surrender supplied. C—O 263

of it so as to bind the wife; and the other moiety was well vested in the daughters. Bill dismissed; but without costs.

8. In case of a surrender made by a steward of a copyhold; if there be any mistake there, that is only matter of fact; and the courts of law will admit an averment that there was such a mistake either as to the lands or uses.

P. 1689, cor. Lds. Comrs.
Towers v. Moor, 2 Vern. 98.

9. A writ of *aiei* was brought in a copyhold court to avoid an estate, after 45 years possession in the defendant, *for that there had been no surrender.*
Per Cur.—A perpetual injunction was granted, for a surrender may be presumed,

M. 1689, cor. Lds. Comrs.
Knight v. Adamson,
2 Freem. 106.
2 *Eq. Abr.* 226. pl. 2.
Vide Lyford and Gower, 1 Vern.
195. where an injunction was
granted in the like case. Pigeon

and Loveday, 11 Car. 1. *Rose and Trelawney*, 35 Car. 2. where a lease was attempted to be avoided for want of livery.

10. Where a copyhold estate is devised, and no surrender made to the use of the will, equity will supply the defect of a surrender, if it be for a child's portion, but not in all cases.

H. 1690, Cane.
Anon. 2 Freem. 115.
2 *Eq. Abr.* 230. pl. 3.

11. A copyhold estate, of the nature of *gavel-kind*, was devised to the eldest son, paying a legacy thereout to his younger brother; but no surrender was made to the use of the will. Equity will supply the want of a surrender, as well in favour of an elder as a younger son.

T. 1690, cor. Lds. Comrs.
Bradley v. Bradley & al.
2 Vern. 163, 164.
1 *Eq. Abr.* 123. pl. 7.

Equity will supply the want of a surrender to the use of a will, when the devise is intended as a provision for younger children, or in favour of creditors or a purchaser.

Vide Hardham and Roberts,
1 Vern. 132. *Croft and Lyfter*,
Vane and Fletcher, 1 P. Wms.
354.

12. Tenants for life of a copyhold sell their estate to *A.*, and surrender to the lord that he may admit *A.* The copyholder in reversion enters, brings ejectment, and recovers at law: *A.* upon a bill was relieved in equity, for the surrender was only that a purchaser might be admitted.

M. 1691, Cane.
Anon. 2 Freem. 118.
2 *Eq. Abr.* 226. pl. 3.

13. One devised a copyhold estate, of the tenure of *Borough English*, to his eldest son, but had made no surrender to the use of his will; and devised some houses to his youngest son. The houses being soon after burnt down, and the youngest son, who was an infant, having never entered thereon; the court, as this case was circumstanced, would not supply the want of a surrender.

P. 1692, Cane.
Cooper v. Cooper, 2 Vern. 265.
1 *Eq. Abr.* 123. pl. 10.
Vide Bradley v. Bradley, 2 Vern.
163.

Temp. W. 3. about 1698.
Kettle v. Townsend, 1 Salk. 187.
 1 Eq. Abr. 122. pl. 3.

In *Watts v. Bullas*, 1 P. Wms. 60 M. R. said, a devise of a copyhold without a surrender ought to be made good for *grandchildren* as well as *children* (1); and if the same case were to come now into the House of Lords it would be so ruled (2); and that he had and would decree it so.

(1) *Vide contra*, *Tudor v. Anson*, 2 Vef. 582.

(2) The like was also declared by Lord Harcourt in *Freestone v. Rant*, T. 1712. And it is observable that the case of *Kettle and Townsend* being cited before Lord Cowper, in the case of *Fursaker v. Robinson*, Prec. in Ch. 475. and 1 Eq. Abr. 123. pl. 9. His lordship doubted thereof, in regard the *grandfather* by stat. 47 Eliz. for maintaining the poor is bound to maintain his *grandchild*, which he said he believed was not taken notice of in that case.

As to those cases in which equity will assist a defective surrender of a copyhold, *vide Watts v. Bullas*, post, and the notes thereto subjoined.

P. 1699, Canc.
Pope & al. v. Garland,
 3 Salk. 84.
Vide Kettle v. Townsend, 1
 Salk. 187.

M. 1699, Canc.
Baker v. Jennings, 2 Freem. 234.
 2 Eq. Abr. 230. pl. 4.

P. 1700, Canc.
James v. James,
 1 Eq. Abr. 123. p. 11.

M. 1702, cor. Wright, C. S.
 M. R. assist.
Watts v. Bullas, 1 P. Wms. 60.
 2 Eq. Abr. 286. pl. 2. 230. pl. 5.

14. One devises a copyhold estate to his grand-son; and *Somers*, Lord Chancellor, decreed the will good, and that equity ought to supply a surrender as well as in case of a son; that a grandson was a son, and the grandfather was bound to provide for him; but the House of Lords reversed this decree; and held, that equity ought not to supply such a defect in disfavour of the heir at law, unless it was in favour of a son or a daughter, and not even then if it was to disinherit the eldest son; but it was not material that such a son was provided for before, nor how far; for the father is the best judge whether he has fully advanced his child or not.

15. Decreed that all devises by copyholders for the use of children or creditors; and all charges made by them upon their lands, for the benefit of children or creditors, will be good in equity, though there was no surrender to these uses.

16. A copyholder in fee, having two daughters, devised his estate to his youngest daughter, whereby her fortune was made greater than her sister's. Testator did not surrender to the use of his will; Equity, however, supplied this defect, notwithstanding the disparity of the daughters' fortunes.

17. A younger son brought a bill, surmising that a copyhold, which his father had devised to him, was surrendered to the use of his will; or, however, that being for the advancement of a child, it ought, if not surrendered, to be made good in equity: he made no proof of any surrender, nor of any attempt to surrender, and was otherwise well provided for; and his elder brother had been 20 years in possession by his consent. His bill was dismissed with costs.

18. *J. S.* made a voluntary conveyance to his brother by the half-blood, which was void and defective at law: afterwards *J. S.* dying without issue, the brother by the half blood brought a bill against

against the heir at law of J. S., to compel him to make good this conveyance in equity. It was contended, that though a conveyance to younger children would, if void in law, be made good in equity, yet it had been resolved in *Dom. Proc.* that they would not supply the want of a surrender in case of a devise of a copyhold to grandchildren (a); and by the same reason, equity should not regard the relation of a half brother; but the master of the rolls was of opinion such devise of a copyhold, without a surrender, ought to be made good for grandchildren (b) as well as children, and if the same case were to come now into the Lords it would be so ruled; and that he had and would decree it so.

(a) *Vide* Kettle v. Townsend, 1 Salk. 187. which Lord Cowper doubted in *Furaker v. Robinson*, *Proc. in Ch.* 475.

(b) *Vide contra*, Tudor v. Anson, 2 Ves. 582.

Note; The authority of the principal case is controverted by Lord Hardwicke in *Goring v. Nash*, 3 Atk. 189. and it seems now to be established, that a defect in the surrender of a copyhold or the execution of a power, (which are governed by the same rules,) shall be supplied only in favor of three descriptions of persons, viz. creditors, wife, and children. *Goodwyn v. Goodwyn*, 1 Ves. 228. *Byas v. Byas*, 2 Ves. 164. *Tudor v. Anson*, 2 Ves. 582. And so, though the wife or child hath only a limited interest (as an estate for life) in the subject, with remainder over to strangers. *Marston v. Gowan*, 3 Bro. Ch. Ca. 170. But it shall not be supplied in favor of a wife or younger child, if the heir at law, being a child of the testator, &c. be thereby left unprovided for. *Vide* Kettle v. Townsend, 1 Salk. 187. *Hicken v. Hicken*, 6 Vin. Abr. 59. pl. 20. *Hawkins v. Leigh*, 1 Atk. 387. It is not material whether the heir in that case be wholly disinherited by his father, so that he has some provision. *Hawkins v. Leigh*, 1 Atk. 387. *Chapman v. Gibson*, 3 Bro. Ch. Ca. 229. *Pyke v. White*, 3 Bro. Ch. Ca. 286. Nor is it material (although formerly doubted, as in *Rofs v. Rofs*, 1 Eq. Abr. 124.) whether the younger children are otherwise provided for or not. *Kettle v. Townsend*, 1 Salk. 187. *Carter v. Carter*, Mos. 370. *Burton v. Floyd*, 6 Vin. Abr. 56. pl. 20. *Weekes v. Gore*, 6 Vin. Abr. 57. pl. 24. *Cooke v. Arnhem*, 3 P. Wms. 283. and *Ca. temp. Talb.* 35. *Tudor v. Anson*, 2 Ves. 582. *Pyke v. White*, 3 Bro. Ch. Ca. 286. So with respect to the wife. *Biscoe v. Cartwright*, Gilb. Rep. 121. *Smith v. Baker*, 1 Atk. 386. The same rules obtain between co-heirs at law and between heirs in gavelkind, as between the eldest son and younger children. *Vide* *Bradley v. Bradley*, 2 Vern. 163. *Baker v. Jennings*, 6 Vin. Abr. 54. pl. 10. *Andrews v. Waller*, 6 Vin. Abr. 237. pl. 12. but if the heir at law be not a child of the testator, &c. although wholly unprovided for, the defect shall be supplied in favor of the wife. *Chapman v. Gibson*, 3 Bro. Ch. Ca. 229. Many of the cases in which these questions have occurred have been decided on another point, viz. whether it sufficiently appeared that the testator intended to devise the unsundered copyhold, as to which *vide* *Harris v. Ingledew*, 3 P. Wms. 93.—For the cases which more particularly respect defective executions of powers, *vide* *Tollett v. Tollett*, 2 P. Wms. 489.

19. An entry in the steward's book, and a parol proof of the foreman of the jury, was admitted as good evidence that a feme covert surrendered her whole estate, although the surrender on the roll, and the admission thereupon, was but of a moiety.

P. 1706, cor. Cowper, C. S.
Hill & Ux. v. Wiggell,
2 Vern. 547.

20. A copyholder in fee surrendered to the use of the mortgagee in fee, and became a bankrupt before presentment, and there never was any presentment made. The question was, Whether the assignees of the bankrupt or the mortgagee should be preferred? *Per* Lord Chancellor—Though the surrender was void in law for want of a presentment,

11 Nov. 1706, cor. Cowper, C.
Taylor v. Wheeler, 2 Salk. 449.
1 Eq. Abr. 122. pl. 3. 312. pl. 8.
2 Vern. 564.

(a) As to the relation of the admittance to the surrender at law in *Roe v. Griffith*, 4 Burr. 1952. *Benfon v. Scott*, 1 Salk. 185, and the authorities there referred to.

(b) The creditors and assignees of a bankrupt are bound by all acts fairly done by the bankrupt, and are subject to the same equity. *Vide Cooke*, B. L. 315. *Tyrrell v. Hope*, 2 Ark. 358. *Pye v. Daubuz*, 3 Bro. Ch. Ca. 595. *Finch v. Lord Winchelsea*, 1 P. Wms. 277. *Jacobson v. Williams*, 1 P. Wms. 382. *Bosvil v. Brander*, 1 P. Wms. 458. *Busban v. Pell*, ib. Cox's note.—*Russell v. Russell*, 1 Bro. Ch. Ca. 269. *Featherstone v. Fenwick*, and *Harford v. Carpenter*, ib. note.

H. 1708, cor. Cowper, C.
Kirk v. Clark, *Pres. in Ch.* 275.
2 *Eq. Abr.* 479. pl. 8.
Gilb. Ch. 251.

21. A man buys a copyhold; and to avoid the charge of a new fine upon the descent of it to his son, surrenders it to the use of himself for life, remainder to his son in fee; and then upon the marriage of his son, to induce the match, tells the lady's relations that he had provided for the son by the copyhold, and marriage articles were made, whereby leasehold lands were settled on the son and the issue of that marriage. The father afterwards married a second wife, and agreed to settle the copyhold on the wife and the issue of that marriage. The wife brought her bill against her husband and his son to have this copyhold settled; but it was dismissed as to the son; for the copyhold being settled by a proper conveyance, and being made a reason to induce the match with the son, became a valuable settlement, and to settle it again was but *actum agere*, and so the comprehending it in the other settlement was improper, since it could not pass by it but by copy only. And here the son's wife did not set up her rest in the written agreement, because the match was founded on the copy of the court roll, whereby the estate was passed to him before.

P. 1708, cor. Cowper, C.
Jennings Executor v. Moore & al.
2 *Vern.* 609.
6 *Vin Abr.* 55. pl. 15.
Affirmed in parliament, 1 Bro.
P. C. 244. *nomine Blenkarn v. Jennens Esq. & al.*

H. 1709, cor. Cowper, C.
Oxwith v. Plummer,
Gilb. Eq. Rep. 17.
2 *Eq. Abr.* 577. c. 1. 226. pl. 5.
(*imperfectly*)
2 *Vern.* 636.

22. A defective surrender of copyhold land for securing a sum of money, which was become void by not being presented in due time, was made good against a subsequent purchaser with notice.

23. A. *cestuy que trust* of a farm (whereof 8 acres were copyhold) mortgaged the farm by the name of such a farm, with general words, not covenanting to surrender the copyhold. A. died, no surrender being made. The mortgagee got a decree of foreclosure against the heir of A., and afterwards A.'s father (who had covenanted to settle said copyhold

hold lands on *A.*) being indebted to *J. S.* by judgment, at the request of the heir of *A.*, surrendered the copyhold to *J. S.* *J. S.* brought an ejectment, and got judgment. Whereupon the mortgagee of *A.* brought his bill for relief. Bill dismissed; for the copyhold was never under any specific lien by the mortgage, and it would be the same were there no children in the case.

24. *A.* surrendered lands to the use of himself and wife for their lives, remainder to his right heirs. Upon a bill to set aside the surrender, it appeared that when *A.* made that surrender he was not expected to live many days; and upon the surrender he declared he made it upon condition that if he recovered the surrender should be returned to him, and his wife should have 100*l.* per annum. *A.* grew better, and demanded his surrender, which was refused; he then made a second surrender of 100*l.* per annum only to his wife, and died. This surrender was conditional; but looking upon it as a security to the wife for the 100*l.* per annum, the court decreed costs out of the estate, as where a person comes to redeem.

M. 1709, cor. Cowper, C.
Mapletoft v. Mapletoft and another, Gilb. Eq. Rep. 8.

Vide 1 Salk. 187. 1 Vern. 132.
2 Vern. 585. 680. Eq. Abr. 124.

25. One who is *cestuy que trust* of a copyhold estate may devise it, without making a surrender to the use of his will.

H. 1711, cor. Harcourt, C. S.
Greenbill v. Greenhill,
2 Vern. 680.

1 Eq. Abr. 174. pl. 4. Gilb. Eq. Rep. 77. Vide Dougl. 719.

26. *B.* having several freehold and copyhold lands, devised all his lands, goods and chattels to his three sons, equally to be divided between them; and also devised 100*l.* to his eldest, provided he gave a lawful, good, and general release to his two younger brothers; and by his codicil appointed, that if one of his younger sons should die, or marry in his minority without consent of his executors, then his portion to go to the other younger son. Lord Chancellor was of opinion that the copyhold lands did not pass by the devise for want of a surrender to the use of the will, though in the case of younger children; because there were freehold lands to satisfy the words of the will.

M. 1714, Cane.
Bullock v. Bullock,
2 Eq. Abr. 211. pl. 7.
5 Vin. Abr. 58. pl. 19.

27. *A.* having made a surrender of his copyhold estate, left it in the hands of the tenant, who took it, in order to be presented. *A.* afterwards made his will, and thereby devised this estate to his children; but the tenant neglected to present the surrender.

18 Feb. 1715, Dom. Proc.
Lloyd & Ux. v. Burton and another,
1 Bro. P. C. 544. 6 Vin. 56. c. 20.
2 Eq. Abr. 230. pl. 6.
Cited 3 P. Wms. 285. in Cook
v. Arnham.

render. Held, that this surrender ought to be made good, and decreed that the estate should be enjoyed according to the will.

P. 1716, Canc.
Nandike v. Wilkes,
Gilb. Eq. Rep. 114.
1 *Eq. Abr.* 393. pl. 5.

(a) Though the penalty of the bond seems to have been the only sanction intended for securing the performance of the condition.

M. 1716, cor. Cowper, C.
Briscoe v. Cartwright,
Gilb. Eq. Rep. 121.
2 *Eq. Abr.* 230. pl. 6. n.

T. 1717, cor. Cowper, C.
Vane v. Fletcher, 1 *P. Wms.* 354.
2 *Eq. Abr.* 231. pl. 9.

(a) *Vide Watts v. Bullas*, 1 *P. Wms.* 61.

M. 1717, cor. Cowper, C. on appeal from the Rolls.
Fursaker v. Robinson,
Proc. in Ch. 475.
Gilb. Eq. Rep. 139.
1 *Eq. Abr.* 123. pl. 9.
Vide Gilb. Ch. 256. *Randall v. Randall*, 2 *P. Wms.* 465.
Fairbeard v. Bowers, 2 *Vern.* 202.
Proc. in Ch. 17.

28. On a treaty of marriage between plaintiff and defendant, defendant entered into a bond to plaintiff's father, conditioned to surrender certain copyholds to the use of himself for life, remainder to plaintiff for life, remainder to the heirs of their two bodies, remainder to the heirs of the husband. After marriage a bill was brought against the husband to compel a surrender. Decreed, that a surrender should be made to the use of himself for life, remainder to the first and other sons in tail general, remainder to the daughters of their two bodies in tail general, and that in the mean time the lands should be enjoyed according to these uses. In this case a specific execution was decreed (a) to secure the issue from being defeated by making them purchasers.

29. In this case the deficiency of a surrender was refused to be supplied, in the case of a wife to whom the husband had devised his copyhold lands, it being suggested that she was otherwise amply provided for out of the testator's freehold and personal estates; but that the heir at law had no other provision but the copyhold, which was not above 30 *l. per. ann.*; whereas the provision for the wife was according to her fortune, which was upwards of 3000 *l.* But the court sent it to the master to enquire into the facts, and report specially, before they would make any decree.

30. Equity will not supply the want of a surrender against the heir of a copyholder, in the case of a voluntary conveyance, as in the case of a wife or child (a); though if the heir himself does any thing to prevent the surrender, it will be a material ingredient in the case.

31. *A.* seised of copyhold lands, which, by the custom of the manor, could only pass by deed, surrender, or admittance, granted and conveyed those lands to his natural daughter, in consideration of 300 *l.* paid by her. The daughter was admitted, but no surrender was made of the lands, as required by the custom. At the foot of the admittance was a proviso, that *A.*, the reputed father,

father, should enjoy the lands for his life, and in the deed there was a covenant for further assurance; yet for want of a surrender, according to the custom, this was agreed to be a defective conveyance. Upon a bill against the heir at law to supply the defect, and to have further assurance, the only question was, if the court could supply the defect in favour of a natural daughter? For the daughter it was urged, that she was a purchaser; but the payment of the 300*l.* was not proved. The subsequent marriage of plaintiff's mother with her reputed father (a) was also urged, but not proved. It was insisted also, that by the law of nature the father should provide for his child, and that the defect ought to be supplied in equity, especially as there was a covenant for further assurance. Objected, that though the law of nature did oblige the reputed father to provide for his bastard child, yet equity was under no such obligation, and it never was attempted to supply the defect of a voluntary conveyance in favour of a stranger, against an heir at law. The plaintiff is a stranger, *nullius filia*, and all the father's affection is not sufficient to raise an use at law; nor can a covenant for further assurance help a conveyance void in itself, for the covenant goes along with the estate; besides, this being a copyhold estate, could not be affected by a judgment, much less by a covenant that would not bind the heir of the copyhold (b). The court, being of the same opinion, dismissed the appeal from the rolls (c); and as to the proviso at the foot of the admittance, it was held repugnant and void, according to a case in *Cro. Car.* or *Cro. Jac.* (d), and the distinction taken in *Kite v. Quinton*, 4 Co. 25.

1 Aik. 508. but Lord Chancellor in the principal case was not satisfied with the difference, and said that by the statute of 43 Eliz. a man was bound to provide for his grandchildren.

(c) *Vide* Watts v. Bullas, 1 P. Wms. 61. Where M. R. said a devise of a copyhold without a surrender ought to be made good for grandchildren as well as children.

(d) This seems to be the case of *Joyner v. Lambert*, 2 Cro. 36.

(a) Although it was admitted the daughter was a bastard at common law, notwithstanding the subsequent marriage, yet it was insisted the maxim of the civil law ought to prevail *quod matrimonium subsequens tollit peccatum procedens*.

(b) In *Kettle v. Townsend*, 1 Salk. 187. it was held that a man was not obliged to provide for his grandchildren as he was for his children, the latter being a debt of nature, but not the former; *et vide* Tudor v. Anson, 2 Vef. 582. and *Elton v. Elton*, 2 Vef. 582.

32. J. S. devised copyhold lands to his daughters, without surrendering them to the use of his will, and died. His son and heir entered and mortgaged them: the mortgagee assigned his mortgage to one of the plaintiffs. Lord Chancellor decreed, that the want of a surrender should be supplied for the benefit of the daughters, notwithstanding they had a very large provision beside the copyhold lands, because the father was the best judge what was a sufficient provision for

M. 1718, cor. Cowper, C.

Weeks v. Gore,

2 Eq. Abr. 232. pl. 11.

6 Vin. Abr. 57. pl. 24.

In 3 P. Wms. 184. (n) is a case of same name, but is not S. C.

for them; and also decreed, that the mortgage, being had without notice [of the devise], should be first discharged, there having been laches in the daughters.

M. 1719, cor. Parker, C.
Wood v. Peasey,
2 Eq. Abr. 55. pl. 3.
5 Vin. Abr. 347. pl. 36.

33. By marriage articles it was covenanted, that within a month after marriage the husband would surrender a copyhold to the wife for life; remainder to the issue, remainder to the heirs of the wife; and if he should neglect or refuse to make such surrender, then he would leave the wife 500*l.* at his death. No surrender was made, and the husband died after the month without assets. Decreed that the heir at law should surrender to the plaintiff and her heirs; and till surrender he should stand as a trustee for her. Here was no election, if done after the month, the 500*l.* was not to be paid; those are two express covenants, and it is not put in the alternative, and here is no purchaser to be defeated; it is a charge in equity.

T. 1721, cor. Parker, C.
Sir Henry Peachy v. Duke of Somerset, Prec. in Ch. 568. 572, 573.
2 Eq. Abr. 228. pl. 10.
1 Stra. 454.

See another point of this case, ante, sect. 1.

34. J. S. a copyholder, by a surrender is tenant for life, remainder to his first and other sons in tail male successively, remainder to himself in fee, but no admittance is made on such surrender, for want of which it was clearly held that J. S. continued and was to be considered as absolute tenant to the lord; and cites Cro. Jac. 403. Bullst. and Yelv. that consequently J. S. was but a trustee for B. his son of the inheritance of these lands; yet that the whole inheritance quoad the lord was in J. S., and any act of forfeiture (a) done by him would bind the inheritance (b), because there must always be some tenants to answer for the whole; but if there had been an admission of J. S. for life, and of the son in remainder, because they come, as it were, by two distinct grants from the lord himself (c), the acts of the one will not bind the other; but till there is an admittance on such surrender, the lord is not bound to take any notice of it (d); but the tenant continues to all intents and purposes the same estate he had before, and the rather, because the lord has no means to compel him to come in and be admitted on such surrender; but if B., the son, should bring a bill against J. S. and the lord, to compel an admittance pursuant to the surrender, it might come then to be considered how far the forfeiture of J. S. would bind B.

(a) Note; J. S. had committed a forfeiture.

(b) If J. S. should commit treason, it would be a forfeiture to the lord of the whole inheritance, and so of any other trustee of a copyhold; and the lord would not be bound by the trust*, nor would the lands in his hands be subject thereto, for a cestuy que trust is not tenant, nor can any act of his, either of treason, felony, &c. affect the copyhold lands.

(c) Vide Rastal v. Turner, Cro. Eliz. 598. Balfpool v. Long, ib. 379. 1 Yel. 1. Noy, 42. S. C. 1 Rol. Abr. 507. f. 15. Anon. Mo. 49. cont.

(d) Vide Hard. 405. 488. 3 Ch. Rep. 403. 1 Sid. 33. Nelf. Ch. Rep. 130.

* Mr. Finch in his notes to Prec. in Ch. says, *quære, et vide* 1 Eq. Abr. 384. (n.) Eales v. England, Prec. in Ch. 200. Hard. 465. 469. 1 Eq. Abr. 311.

§3. Defective or Want of Surrender supplied. C—o 271

35. An admittance by virtue of a forged letter of attorney, in the name of a copyholder, to surrender a copyhold to the use of *A.*; the attorney surrenders accordingly, whereupon *A.* is admitted. This is a void admittance.

the purchaser to see the letter of attorney was a true one. The decision in this case, however, does not appear to have been followed. *Vide contra Ashby v. Blackwell*, Amb. 503.

T. 1712, cor. Macclesfield, C.
Hildyard v. South Sea Company
and another, 2 P. Wms. 77.
2 Eq. Abr. 232. pl. 12.

Lord Chancellor said, the rule of caveat emptor applied in this case, for it was the business of *A.*

36. A copyholder in fee surrendered to the use of the mortgagee in fee, but before the presentment of the surrender he became a bankrupt. This defective surrender was established by the court against his creditors.

P. 1723, cor. Macclesfield, C.
Cock v. Goodfellow, 10 Mod. 492.
2 Eq. Abr. 443. pl. 1.

37. *A.* being seised of a copyhold estate, attempted to surrender it to the use of his will, with a resolution to devise it to *B.* his sister's son; but a surrender not being practicable, (by reason of some accidents,) he prevailed upon his sister, who was his heir at law, to give a bond, conditioned to surrender at her son's request upon payment of 200*l.* *A.* died; *B.* received the rents and profits some time, and then died intestate, leaving only two sisters. The mother administered, and having procured herself to be admitted tenant to the copyhold, &c. devised it by will to one of her daughters, and sister of *B.* The other daughter brought her bill against the devisee for a specific performance of the condition of the bond, by which she would be entitled to a moiety of the land. Decreed that the mother should be considered as a trustee for *B.* her son, and that a surrender and conveyance should be made accordingly upon payment of the 200*l.* with interest from the death of *A.*

M. 1724, cor. Parker, C.
Parks v. Wilson, 10 Mod. 515.
2 Eq. Abr. 22. pl. 20.

Vide Hobson v. Trevor, 2 P. Wms. 191. *Wright v. Wright*, 1 Ves. 409. Fontbl. Eq. 142. 1 Powell on Contracts, 314. 2 Fontbl. Eq. 37. *Gage v. Aston*, Com. Rep. 67. *Aston v. Pierce*, 2 Vern. 480. *Dale v. Smithwick*, 2 Vern. 151. *Camel v. Buckle*, 2 P. Wms. 243. *Watkins v. Watkins*, 2 Atk. 97. *Beard v. Beard*, 3 Atk. 72. Bonds have been considered in equity as evidences of agreements, and the obligors have been held to a specific performance and not allowed to forfeit the penalty. Lord Raym. 683. *Horton v. Maffell*, 2 Vern. 24. *Duke of Chandos v. Talbot*, 2 P. Wms. 608.

Note; In 2 Eq. Abr. 22. pl. 21. this is stated to be the same as *Alison's case*, 9 Mod. 62. which see ante, tit. Bond, § 6. pl. 5. and notes.

38. *A.* covenanted for himself and his heirs to surrender a copyhold estate to certain uses, and died before it was done. A bill was brought against his heir for a specific performance of this covenant; and a surrender was decreed accordingly.

Hobson v. Trevor, 2 P. Wms. 192. *Randall v. Randall*, 2 P. Wms. 464.

M. 1725, Cane.
Norris & al. v. Keck,
9 Mod. 106.
2 Eq. Abr. 25. pl. 25. and note.
Vide 9 Mod. 62. Ch. Ca. 252.
Com. Dig. tit. Chancery, (2 X1.)
Tooke v. Hastings, 2 Vern. 97.

39. The bill in this case was to have execution of articles for the sale of some copyhold lands to plaintiff, on payment of 538*l.* to defendant *R.* (a guinea being paid in part,) and to compel the lord

H. 1726, cor. King, C.
Sayle v. Reeves & al.
Gibb. Eq. Rep. 188.
2 Eq. Abr. 25. c. 27.
Note; Lord Chancellor said, this seemed to be a bill brought

to get at the opinion of the court, whether plaintiff had bought a good title, but *that* the court would not determine upon.

T. 1728, cor. King, C.

Cotter and Loyer,

1 *Eq. Abr.* 42. pl. 5. *Mof.* 227.

2 *P. Wms.* 623.

2 *Eq. Abr.* 664. pl. 12.

See this case at large, post, tit. *Power.*

of the manor to admit plaintiff in fee according to the agreement; which was decreed: but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs.

40. Bill to establish a voluntary surrender made by plaintiff and his wife to the use of him and his heirs, against defendant, who was an only daughter by the wife's former husband. The wife was dead; this surrender was made in pursuance of a power reserved to the wife to surrender to such uses as she should (in the presence of three witnesses) by writing or by will appoint. The surrender under which plaintiff claims was made in the presence of two witnesses only, but the steward who took it put his name to it, and might be deemed a third witness; and on this ground a bill was brought to establish it as a good surrender in pursuance of the power. Defendant pleaded, and claimed title under the wife's will, published in the presence of three witnesses antecedent to the surrender to plaintiff; and likewise demurred, for that if plaintiff had any title it must be at law, and he might bring his ejectment. Lord Chancellor at first thought both the plea and demurrer good, but at last he over-ruled the plea, and allowed the demurrer.

M. 1728, cor. M. R.

Toller v. Toller, 2 *P. Wms.* 490.

2 *Eq. Abr.* 233. pl. 16.

Vide Watts v. Bullas, 1 *P. Wms.* 60. and (n.)

41. Equity will supply the want of a surrender in case of a *devise for payment of debts*, or for a *wife or younger children*.

M. 1729, cor. M. R.

Rofs v. Rofs,

1 *Eq. Abr.* 124. pl. 14.

The proper name of this case is *Rofs v. Rofs*, and is so cited in 6 *Vin. Abr.* 238.

42. *A.* being seised of several freehold and copyhold lands in *B.* the freehold being about 72 *l. per ann.* and the copyhold about 16 *l.*; and being also seised of another freehold estate in *C.* of about 3 *l. per ann.*; all of which being in mortgage for 600 *l.* the mortgagor made his will, and thereby devised all his lands in *B.* to his wife and her heirs, and died without issue, leaving his brother his heir at law. Testator had not surrendered the copyhold estate in *B.* to the use of his will. *Per M. R.*—The court ought not to supply the want of a surrender in this case; *first*, because the words of the devise are satisfied by the freehold lands in *B.* which passed thereby; and therefore it was not certain that he intended to give her the copyhold likewise; and, *2dly*, if he had so intended, yet the brother, who was his heir at law, would thereby be

be disinherited of almost the whole estate, and have nothing but the *3 l. per ann.* in C.; and though the court will in all cases supply the want of a surrender for payment of debts, yet not for the wife in disinherison of an heir at law, or for younger children against an elder, to make them in a better condition than the elder.

43. One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by his will. The copyhold, though not surrendered to the use of his will, shall * yet be applied to the payment of the debts, *pari passu* with the freehold.

in favor of creditors, so far only as may appear necessary for the payment of the debts, and consequently while any freehold estate remains applicable to that purpose the want of the surrender of the copyhold shall not be supplied, notwithstanding the express intention of the testator to charge the copyhold rateably therewith, or in preference to the freehold.

Vide Drake v. Robinson, 1 P. Wms. 441. Haslewood v. Pope, 3 P. Wms. 322. Malabar v. Malabar, Ca. temp. Talb. 78. Combs v. Gibson, 1 Bro. Ch. Rep. 273. Hillier v. Tarrant, Ca. temp. Talb. 3d edit. 288. n.

But this is to be understood of the legal estate only, for an equitable estate of copyhold lands will pass by such devise without a surrender. *Vide Car v. Elfrison, 1 Atk. 73. Tufnel v. Page, Bernard. 9. Allen v. Poulton, 1 Ves. 121. Macnamara v. Jones, 1 Bro. Ch. Rep. 481. Lindopp v. Eboral, 1 Bro. Ch. Ca. 188. Kentish v. Keptish, ib. 257.*

If I charge all my lands with payment of my debts, and devise part to A. and other part to B., &c. the creditors cannot be paid out of the lands till the master has certified the proportion which each devisee is to contribute: but if the master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole.

not appear by the pleadings or by the words of the decree that the case was put upon that ground.

If a copyhold be made liable to pay debts, and the charge being equitable, only the legal estate of the copyhold descends to the heir. In a bill brought by the creditors, praying a sale, it seems necessary to make the heir a party, otherwise the legal estate of the copyhold cannot be conveyed to a purchaser; but in case it appears that the heir at law has, since the testator's death, conveyed away all the copyhold, then, the grantee of the heir being capable of conveying to the purchaser, it may not be necessary to make the heir a party.

44. Bill by plaintiffs for an injunction against defendant, eldest son of a copyholder, to make good the defect of a surrender of a copyhold in

VOL. II.

T

favour

H. 1710, cor. Jekyll, M. R.
Harria v. Ingledew,

3 P. Wms. 96.
2 Eq. Abr. 233. pl. 17.
482. pl. 13.

* This is not now received as the law of the courts of equity, which supply the want of a surrender of a copyhold estate in

the law of the courts of equity, which supply the want of a surrender of a copyhold estate in

the law of the courts of equity, which supply the want of a surrender of a copyhold estate in

the law of the courts of equity, which supply the want of a surrender of a copyhold estate in

the law of the courts of equity, which supply the want of a surrender of a copyhold estate in

Vide Noys v. Mordaunt, 2 Vern. 581. Streatfield v. Streatfield, Ca. temp. Talb. 176, &c.

In *Hillier v. Tarrant* this was treated as a case in which the heir at law was bound to make good the surrender of the copyhold by his election to take under the will according to the principle of *Noys and Mordaunt*, and *Streatfield v. Streatfield*; but it does

3 P. Wms. 97. N. to S. C.

M. 1733, cor. Talbot, C.
Hicken & al. v. Hickin,
2 Eq. Abr. 233. pl. 18.
6 Vin. Abr. 59. pl. 20.

favour of a will, whereby the father gave his copyhold and all other his estate, for the maintenance of the plaintiffs, his younger children, till 21, and then to be divided among the plaintiffs, and defendant to have a share. Lord Chancellor said, the rule is, when the eldest son is totally disinherited, not to interfere; and this is very near to a total disinherison, the eldest not being to have any thing till the youngest are of age. Injunction denied.

T. 1734. cor. Talbot, C.
Cook v. Arnam, 3 P. Wms. 283.
Ca. temp. Talb. 35.
2 Eg. Ar. 235. pl. 21.

(a) Watta v. Bullas, 1 P. Wms. 60.

Vide Kettle v. Townsend,
1 Salk. 187. Burton v. Lloyd,
1 Bro. P. C. 544.

29 Nov. 1734, cor. Hardw. C.
Hawkins v. Leigh and others,
1 Atk. 387.

(b) Allen v. Poulton, 1 Ves.
123. Milbourn v. Milbourn,
2 Bro. Ch. Ca. 64. Trod v. Downes, 2 Atk. 314. et vide Ex parte Caswell, 1 Atk. 560.

(c) Carr v. Ellison, 3 Atk. 75.

45. If a copyhold be devised to a younger child, and no surrender to the use of the will, though by the same will there be other provision made for the child; yet such copyhold, being part of the provision, the court will make it good, unless in a case where the eldest son and heir is totally disinherited (a); and though the devise be of a copyhold to a second son, after the death of the eldest son without issue, equity will supply the want of a surrender.

The father is a proper judge of what is a fit provision for his child; for which reason the court of chancery will supply the want of a surrender of a copyhold devised by a father to his child, notwithstanding he has otherwise provided for him.

46. A. by will, gave all his lands unsettled, and all his goods and chattels to his wife for life, and afterwards to his younger children, in such manner as she should think fit to dispose of the same. The testator died seised of freehold lands and customary messuages which were unsettled, and not surrendered to the use of his will.—*Per Cur.* The lands settled being only freehold, naturally, the lands unsettled must be of the same kind; and therefore the copyhold lands did not pass.

Where there is no surrender of copyhold lands to the use of a will, they will not pass by a general devise of lands, for copyholds are not devisable, but pass by the surrender (b).

Though there be no surrender to the use of a will, yet the will is sufficient to pass an equity in copyhold lands (c); but in the present case there is more than an equity, for the copyholds descend to the son as his father's heir.

Equity will not supply the defect of a surrender of copyhold estates, in favour of a wife or younger children,

§3. Defective or Want of Surrender supplied. C—o 275

children, to the disinherison of an heir unprovided

for (a).

(a) *In casu Chapman v. Gibson*, 3 Bro. Ch. Ca. 229. most of the cases on this subject are collected. By that and the case of *Pike v. White*, 3 Bro. Ch. Ca. 286. it appears that equity will supply the want of a surrender in favor of a wife and children against the heir, though not provided for by the testator, if otherwise provided for.—But the same reasons do not seem to apply if the heir be totally unprovided for. The reader is referred to the M. R.'s arguments in the former of the above cases, and to the notes (by Mr. Cox) annexed to the case of *Watts v. Builes*, 1 P. Wms. 60. also to *Banks v. Denham*, 3 Atk. 585.

But the word *disinherison* is not confined to an heir barred of his descent; for if he is provided for by settlement, or any other way, he cannot be said to be *disinherited*.

47. J. S. devised his real estate to be sold to pay debts and certain pecuniary legacies, and subject thereto he devised his personal estate to his sister. Talbot, Ch. refused to supply the defect of a surrender of the copyhold to the use of his will, against the heir, if the other estates were sufficed to pay the debts; and dismissed the bill with costs as to this point, it having been confessed by the answer, that the testator's other estate (exclusive of the copyhold) was more than sufficient to pay the debts.

P. 1735, cor. Talbot, C.
Mallabar v. Mallabar,
Ca. temp. Talb. 78, 79.
2 Eq. Abr. 234. pl. 22.
Vide Drake v. Robinson 1 P.
Wms. 443.

48. Testator being seised of some copyhold lands in *Middlesex*, had mortgaged them to defendant *Ennis*, who was admitted upon the mortgage*. Testator then made his will, reciting that he had surrendered the copyhold to the use of his will, and he thereby devised the copyhold premises to plaintiff, his nephew, and his heirs; and after all debts paid, he devised the residue to his son, defendant *King*, and his heirs, appointing him executor. Upon a bill by the nephew, that the mortgage might be paid out of the testator's personal estate, Lord Chancellor said, a man may devise an equity of redemption of a mortgage, without having surrendered it to the use of his will (b); and so decreed: and that the mortgage should be paid out of the testator's personal estate, if sufficient; and if not, then out of the real estate.

T. 1735, cor. Talbot, C.
King v. King and Ennis,
Mos. 192. 3 P. Wms. 358.
2 Eq. Abr. 234. pl. 21.

* Therefore the mortgagor not having the legal estate in him could have no estate to surrender.

990. *Tufnel v. Page*, 2 Atk. 37. *Car v. Ellifon*, 3 Atk. 73.
Macnamara v. Jones, 1 Bro. Ch. Ca. 481.

(b) *Vide Strudwicke v. Strudwicke*, 3 P. Wms. 360. S. P.
Greenhill v. Greenhill, 2 Vern. 680. *Macey v. Shurmer*, 1 Atk. Allen v. Poulton, 1 Vef. 121.

42. If a man expressly devises copyhold lands, and dies without making a surrender to the use of his will, the want of a surrender shall be supplied. But if he dies seised of freehold and copyhold lands,

1*35, Cane.
Attorney-Gen. ral v. Mott & al.
2 Eq. Abr. 234. pl. 23.

T 2

and

and devises his lands generally, so that there is no evident intention to pass the copyhold, there equity will not interpose against an heir at law unprovided for, such surrenders not being aided, but where the words of the will cannot be satisfied without extending them to the copyholder.

12 July 1737, cor. Hardw. C.
Smith v. Baker, 1 Atk. 386.

50. Where a *copyhold* is devised to the wife, the court will supply the want of a surrender, even though she has a provision under a settlement.

The rule, that the court will not supply a surrender against an heir, must be applied solely to an heir in blood, and not to an *heir factus* (a).

(a) *Hawkins v. Leigh*, 1 Atk. 388, (n.)

18 July 1737, cor. Hardw. C.
Taylor v. Taylor,
1 Atk. 386, 387.

51. A father purchased copyhold lands in his son's name, and continued in possession till his death. The son devised these lands as follows: "As to my copyhold, which I have or intend to surrender to the use of my will, I give two-thirds thereof unto my wife in fee (b), and the remaining third I give to the child or children with which my wife is now ensient, and to the heirs of such child or children for ever; and if such child or children should not be born alive, or being born alive, should die without leaving lawful issue, or before he or she has disposed of the same, I give it to my wife." The wife was not with child. Lord Chancellor thought this estate well devised, and passed by the will so as to have a surrender supplied, and that it ought to be construed as if he had said, *and if no child be born alive*.

(b) The reporter does not notice this, but it is warranted by Reg. Lib. B. 1736, fo. 488.
Vide Chapman v. Gibson, 3 Bro. Ch. Ca. 331.

7 Dec. 1739, cor. Hardw. C.
Macey and others v. Shurmer,
1 Atk. 389.

52. N. S. by his will, devised to his wife and her heirs all his freehold and copyhold lands, being well assured she would, at her decease, dispose of the lands amongst all, or such of his children, as by their conduct should deserve it. The wife devised all the freehold and copyhold lands, except the copyhold in *Hampton*, to her daughter and her heirs; and *that copyhold* to the heir at law of the testator and his heirs. The testatrix gave directions for the surrenders of the respective copyhold estates to the use of the will, but died before they were perfected: the heir not being *totally unprovided for*, the court supplied the surrender (c).

(c) This bill was brought by creditors, of whom the husband borrowed money to buy the estates devised.

The

§ 3. Defective or Want of Surrender supplied. C—D 277

The word *such* gave the wife the power to devise the whole to one child if she had thought fit, (b).

(a) *Vide* Swift v. Gregson, 1 Term Rep. B. R. 432.

The trust of a copyhold not necessary to be surrendered (b).

(b) *Vide* Carv. Ellison, 3 Atk. 75.

53. The same construction in the cases of surrenders of copyhold estates must take place, as in all other conveyances at law (c).

10 Dec. 1740, cor. Wright, M.R. *Sutton v. Stone & al.* 2 Atk. 101.

Fisher v. Wigg, 1 P. Wms. 14. *Cox's* (n. 1.) *Rigden v. Vallier*, 2 Vef. 257. Copyholds are not within the statute of uses, (27 H. 8. c. 10.) *Rowden v. Maltster*, Cro. Car. 44. *Rigden v. Vallier*, acq.

(c) *Vide* *Idle v. Cook*, 1 P. Wms. 70. *Holt's case*, 164.

Before admittance, a mortgagee may bring a bill of foreclosure; and after a decree, an ejectment for the possession of the mortgaged premises.

54. *A.* settles his freehold estate upon *B.* and the heirs of his body, with remainders over, and surrenders his copyhold of the manor of *Taunton* to *C.*, upon condition that he surrender to *D.* and his heirs, subject, however, to *A.*'s will. *C.* accordingly surrenders to *D.*, and *A.* by will, reciting the surrenders, desires *D.* to contrive, if possible, that the copyhold might be continued to the owners of the estate at *Orchard*. *D.* surrendered this copyhold to the use of his will; and by the custom of the manor, a surrender after seven years is void, and the estate goes to the widow; *D.* outlives the seven years and dies, having first made his will, and devised the copyhold to *B.* in tail, with remainder over as aforesaid: and forasmuch as *D.* is only a trustee, equity will supply the defect of a surrender. But there being no proof in this case, that it was possible, by the rules of the manor, to settle this copyhold in tail as the freehold, the cause was put off till further proof.

P. 1742, cor. Hardw. C. *Portman v. Seymour*, 9 Mod. 280.

The word *desires* is equal to devise, because it expresses the intention of the testator, and the purpose of every will is to do no more. *Vide* *Alcock v. Spaukett*, 2 Vern. 228, 229.

55. The surrender of copyhold estates must have the same construction with feoffments at law, and other conveyances, and not as a will (d); and if the limitations of a copyhold are so framed, as by the rules of law they are void, they must take their fate, and no intention can make them good.

23 Nov. 1743, cor. Hardw. C. *Lovell v. Lovell*, 3 Atk. 11.

(d) Copyhold estates are not within the statute of uses. *Rigden v. Vallier*, 2 Vef. 257.

56. Testator having a copyhold house, part in one manor and part in another, devised thus: "I give to my son *H.* all my lands, tenements, and
T3 "heredi-

15 Dec. 1743, cor. Hardw. C. *Goswain & al. v. Barker*, 3 Atk. 8.

(e) Lord Chancellor laid great stress on this relative pronoun which.

"hereditaments, *freehold and copyhold*, in C., or "elsewhere in *Middlesex*, (which (a) copyhold "lands I have surrendered to the use of my will)." Testator had only surrendered in one of the manors. Lord Hardwicke said, as to the words within the parenthesis, a parenthesis is not to be rejected in legal cases, though, according to the rules of grammar, a sentence may be complete without it. In the present case Testator had coupled the words *freehold and copyhold*, which made a parenthesis necessary with the repetition of the word *copyhold*. The question here is between an heir and devisee. An heir is not to be disinherited unless by express words, or a necessary implication; and the rule holds equally where he is heir of *customary lands*. The testator had surrendered a *part* of the house which he devised. Lord Chancellor said, if the testator had described the house by name (*viz.* the *King of Bohemia's Head*) the whole would have passed; but it appears that one part of the house was not bought till after the first surrender, which explains the intention of the testator. The court must make so many stretches in this case to disinherit the customary heir, that it is better to let the words have their obvious meaning, though the defendants are younger children, and claim it as a provision (b).

(b) In *Banks v. Denhire*, 3 Ves. 63. and 3 Atk. 585. Lord H. said, he determined this case reluctantly. Indeed the parenthesis in this case, which seems to have been the ground of the determination, appears to differ but very slightly from that in *Banks v. Denhire*. *Vide Allen v. Boulton*, 1 Ves. 121.

9 Mar. 1744, cor. M. R. sbf. C. *Roome v. Roome*, 3 Atk. 182.

(c) *Vide Smith v. Baker*, 1 Atk. 385. *Hawkins v. Leigh*, 1 Atk. 387. and notes. *Goring v. Nash*, 3 Atk. 191.

(d) *Sic* in *Chapman v. Gibson*, 3 Bro. Ch. Ca. 229. *Pike v. White*, 3 Bro. Ch. Ca. 286.

22 Oct. 1744, cor. Hardw. C. *Goring v. Nash and others*, 3 Atk. 191, 192.

57. A question arose in this case, Whether the want of a surrender of copyhold lands to the use of testator's will should be supplied? *Per* M. R. The general rule is, that the want of a surrender shall be supplied in favour of creditors, or in case of a provision for a wife or children (c); but his Honor doubted whether it could be supplied against an heir disinherited or unprovided for by his ancestor in any way (d); and his Honor declined to make any decree that should be binding, as in the principal case the heir was an infant, he therefore gave him liberty to apply to the court on this point, when he should come of age.

58. A father limits a copyhold estate to a first son in tail, and to a second, third, fourth and fifth son, and there is no surrender: upon a bill by the second

second son, to have it supplied, the court will decree it for the *third, fourth, and fifth son*, in the same order in which the father has left it. *Vide Roomer v. Roomer, 3 Atk. 182. Pike v. White, 3 Bro. Ch. Ca. 286.*

Where it does not introduce a hardship, or leave the other children in distress, the court always decrees the provision made by a parent for one child to be as extensive as he intended it.

59. A grandfather is not bound to provide for a grandchild, especially where a father is living at the time of the will, and after the testator's death. *19 May 1747, cor. Hardw. C. Elton v. Elton, 3 Atk. 308.*

Where there is no surrender of a copyhold estate by a grandfather, to the use of his will, the court will not supply it against an heir in favour of the grandchild (a).

(a) *Vide Kettle v. Townsend, 1 Saik. 187. Prec. in Ch. 477. Tudor v. Anson, 1 Ves. 532.*

60. A testator says in his will, "I give all and every my freehold and copyhold messuages to A. and B. (having surrendered the copyhold part thereof to the use of this my will (b))." He had two copyholds, one of which he had surrendered, the other not. Lord Hardwicke said, it being clearly the testator's intention that both should pass, and being a devise to a younger child totally, the court directed the heir at law to surrender it to the same uses as were declared by the will (c).

9 Dec. 1747, cor. Hardw. C. Banks v. Denbire and others, 3 Atk. 585. 1 Ves. 63.

(b) Lord H. said, these words being in a parenthesis are but in nature of a recital, and as such considered only as a mistake, and not descriptive of what the testator intended should pass as in Gascoigne v. Barker, 3 Atk. 8. which case his lordship said he determined with much reluctance, but he was bound by the restrictive words.

(c) *Vide Hawkins v. Leigh, 1 Atk. 187. et ante and notes.*

61. Testator devised to his grandson, by a daughter, several copyhold estates in a certain manor, to hold to him in fee. He had two copyhold estates in that manor, neither of which he had surrendered to the use of his will; one of them was a trust estate (d). He had also other copyhold estates in a different manor, which he had surrendered (e). The court supplied the defect of the surrender.

25 Oct. 1748, cor. Fortesc. M. R. Allen v. Poulton, 1 Ves. 121.

(d) A trust copyhold may be devised without a surrender.

(e) *Vide Gascoigne v. Barker, 3 Atk. 8. Banks v. Denbire, 3 Atk. 585. and 1 Ves. 63.*

62. A copyhold estate was devised to a charity, and not surrendered to the use of the will: the devise was held good, though unattested, notwithstanding the statute of frauds; it amounting to a direction to the heir to make a surrender. It was also good by way of appointment, under 43 Eliz. by which a devise of lands in tail was held good, though no recovery suffered.

9 Mar. 1749, cor. Hardw. C. Attorney-General v. Andrews, 1 V. 225.

Vide Tufnel v. Page, 2 P. Wms. 262.

Cestuy que trust of a copyhold estate may devise it without surrender, and by an *unattested* will, notwithstanding the statute of frauds.

11 Mar. 1749, cor. Hardw. C.
Goodwyn v. Goodwyn, 1 Ves. 228.

63. The defect of a surrender will be supplied in equity, in favour of a wife or child, but not in favour of a grandchild.

11 April 1749, cor. Hardw. C.
Taylor v. Phillips, 1 Ves. 229.

64. A feme covert, without her husband's joining, (but in his presence,) surrendered her copyhold estate to the use of her will or appointment, and then devised it to A. The fact of the surrender not being before the court, it was sent to be tried. Lord Chancellor doubted how far this surrender would be good, for A. must take by the surrender, of which the instrument of appointment only directs the uses, and he must come in under the estate of the lord. As to the question, Whether the wife can make such a surrender? Lord keeper said, a surrender differs from a fine, which is good against the wife's heir by estoppel, though it passes no estate; but if the surrender is bad there will be no estoppel. His lordship thought it strange the steward should take the surrender in the husband's presence, if the frame of it created not a possibility that there might be such a surrender.

3 Aug. 1749, cor. Hardw. C.
Ex parte Butler and another.
Assignees, 1 Ash. 216.

65. Where the legal interest in a copyhold is in one person, and the equitable interest in another, the court can order the trustee who hath the legal interest to surrender, although the *cestuy que trust* refuses.

M. 1749, — C. B.
George dem. Thornbury v. —,
Ambl. 627, 1 Eg. Abr. 61.

66. A widow, seised in fee of copyhold lands, surrendered them to the use of her will; previous to a second marriage her intended husband, by articles, agreed she should have power to settle or devise the estate during coverture; after marriage baron and feme mortgaged the estate for 99 years (under the lord's licence) without a surrender or fine levied; afterwards the wife made her will, devising the premises to her second husband and his son, and then died. Upon an ejectment by the heir at law, the court declared for the lessor of the plaintiff, for testatrix being a feme covert, could neither make a will (a) or declare the uses of the surrender.

(a) A feme covert cannot make a will of lands; it is contrary to the statute of 34 & 35 H. 8. c. 5. But there is no doubt that a husband may give his wife a power to dispose of her personal estate,

estate,

estate, because he hath the sole property in and power over it (1). As to the surrender, it was fluctuating and ambulatory (2), till some further legal act was done to complete it, and is like a presentation, which is revocable and fluctuating till induction; therefore the marriage either made it absolutely void or suspended it; in either case its operation is prevented, and of consequence no interest can vest in the defendant. The lord can never be considered a trustee, in whom the land is to vest for the benefit of the devisee, for it appears plainly by Poph. 174. 4 Co. 23. and Cro. Elis. 441. that whenever the fee simple, &c. of a copyhold estate is by surrender limited to the use of a will, the fee simple remains in the copyholder, and is not vested in the lord; therefore he cannot be considered as a trustee. As to the mortgage, it must be bad at all events; for there ought to have been either a fine or surrender, so as the same might be privately examined; for a custom to bar without surrender, or a private examination, would be bad.

(1) *Vide* Wright v. Lord Cadogan, 6 Bro. P. C. 156. Rippon v. Dawling, Amb. 565. Bramhall v. Hall, Amb. 467.

(2) By custom the surrender of a feme covert with the assent of her husband, is good. Mos. 123. cited in Bro. Ch. Ca. 387.

67. As surrenders of copyhold estates are often made by the surrenderer *in extremis*, and when he is *inops consilii*, they are to be considered as wills, and construed favorably. So held by Gould, J. and Turton, J.; but Lord Chief Justice Holt was of opinion, as to raising and passing estates, that copyholds ought to be governed by the rules of the common law, and that a surrender of copyhold lands to uses, was not within the statute of uses, it being only a direction to the lord whom to admit, and when admitted, the surrenderee is in by the grant of the lord and not of the surrenderee.

25 Mar. 1751, cor. Hardw. C.
Rigden and others v. Vallier,
3 Atk. 724. 2 Ves. 257.

68. Mortgages of copyholds are constantly made by conditional surrender; and if that surrender is not presented, the general custom of the manor is, that it becomes void. The surrender may be presented, though the tenant is dead without heir. The surrenderee has a right to be admitted, and the death of the surrenderer in the mean time makes no difference, as has been held.

15 June 1751, cor. Hardw. C.
Fawcett v. Lawther,
2 Ves. 302, 301.
See this case more at large, post,
sec. 9.

69. A defect of a surrender of a copyhold will be supplied in equity for the benefit of a widow and children, but not for a grandchild, cousin, or natural child.

9 Aug. 1754, cor. Hardw. C.
Tudor v. Anson, 2 Ves. 582.
1 Eq. Abr. 123, 124.

It will also be supplied in favour of creditors, where there is no other real estate, and where there is a general *devise of real estate*, preceded by a direction to pay debts.

70. Testator devised to his heir at law his real and personal estate in remainder, after the death of his wife. Testator, at the time of his death, had freehold and copyhold estates, the latter of which he had not surrendered to the use of his will; after testator's death his heir at law claimed the

3 May 1763, cor. Henley, C.
Uners v. Wilkes & al. Amb. 430.

the copyhold, *not surrendered*, as heir; and the real and personal estate, as devisee. Testator's widow filed her cross-bill to put the heir to his election. Decreed he should make his election accordingly.

T. 1769, cor. Northington, C.
Attorney-General v. Downing and others, Amb. 571.

71. Equity will not supply the defect of a surrender, in favour of a charity to which an estate is devised, after several prior limitations in tail.

19 Dec. 1772, in Scacc.
Frank v. Standish,
1 Bro. Ch. Ca. 588. (n.)

72. A testatrix being seised of freehold estates and some copyhold lands lying dispersedly, and having surrendered her copyhold lands to the use of her will, devised all her real estates, and gave Lady S., one of her co-heirs, 1000*l.*: after making her will she exchanged all these copyhold lands for others which were surrendered to her; but she did not surrender them to the use of her will. Lady S. was put to her election (a), and having elected, to take the legacy of 1000*l.* Decreed, that she and the other co-heirs should surrender the copyhold to the uses of the will.

(a) *Vide* *Noys v. Mordaunt*,
2 Vern. 581. S. P.

P. 1788, cor. Thurlow, C.
Bixby v. Eley, 2 Bro. Ch. Ca. 325.
1 E7. Abr. 124.

73. Testator, by will, specifically devised his freehold estate, and directed his copyhold to be sold for payment of debts. Decreed, the surrender to be supplied, and the copyhold to be sold before applying the freehold.

T. 1788, cor. Buller, J. abf. C.
Compton v. Collinson,
2 Bro. Ch. Ca. 377.
1 E7. Abr. 61.

74. A feme covert having a power, by articles of separation, to dispose of her estate, a question arose, Whether her surrender of a copyhold was good? Upon which a case was made for the opinion of the court of C. B., as to what estate passed under the surrender, will and codicil, of the testatrix (b).

(b) Although Mr. Justice Buller did not examine the several cases determined on articles of separation, yet in his general allusion to them, and in pronouncing his decree, he has afforded the reader much useful information. See the reporter.

Note; It seems to have been determined that the surrender of a feme covert, with the assent of her husband, is good by custom. *Mof.* 123.

9 July 1790, cor. Thurlow, C.
Wardell v. Wardell,
3 Bro. Ch. Ca. 116.

75. A testator having limited several copyhold estates upon certain trusts by will, and taking notice that he had not surrendered them to the use of his will, whereby they would descend to his son, directs his son to convey and surrender them to the persons to whom they were limited, according to the intention of his will, (the son having other estates thereby devised to him). The copyhold estates not being by the custom of the

the manor, devisable by will, it was insisted the court could not decree a surrender. But Lord Chancellor was clearly of opinion, that though they were not devisable by the custom, yet as the testator might dispose of them, and had marked his intention so to do, it brought it within the principle upon which the court supplies surrenders for payment of debts, or provisions for younger children; which are considered as meritorious considerations: and decreed the surrenders accordingly.

96. Testator devised a copyhold estate to his executors to be sold: then to pay the interest of the produce to his wife for life, and after her death to pay the principal to the children of his sisters. Testator died without having surrendered his copyhold estate. Objected, that the court could not supply the surrender partially, in favour of the wife, as the nephews and nieces were not entitled to have the defect made good for them: but Lord Chancellor did not see why a surrender should not be supplied for a limited interest as well as a general one. Decreed, the estate to be sold, and the wife to have the interest of the produce for life, and then the principal to result to the customary heirs.

M. 1790, cor. Thurlow, C.
Marlton v. Gowan,
3 Bro. Ch. Ca. 170.

97. A surrender was supplied in this case, for a wife against a distant heir not provided for by the testator, but provided for aliunde.

H. 1791, cor. M. R.
Chapman v. Gibson,
3 Bro. Ch. Ca. 229.

The principle of this may be collected from the following cases, save as to the exception of an eldest son unprovided for. *Hardham v. Roberts*, 1 Vern. 132. *Bradley v. Bradley*, 2 Vern. 163. *Bath and Monague*, 3 Ch. Ca. 106. In *Kettle and Townsend*, 1 Salk. 187. it is said not to be material whether the son is before provided for, for the father is the best judge of his son's provision. See in *Freestone v. Rant*, mentioned in n. to *Watts and Bullas*, 1 P. Wms. 61. *Watts and Bullas* shews only that a brother of the half blood is not within the case. In *Tollett v. Tollett*, 2 P. Wms. 489. a defective execution of a power was supplied for a wife. In *Rofs and Rofs*, 1 Eq. Abr. 124. (cited in 6 Vin. Abr. 238. by the proper name of *Bosq v. Bosq*) the surrender was not supplied, because the devise was satisfied by a freehold, which passed by the will. In *Cook v. Arnham*, Ca. temp. Talb. 35. it was only doubted whether the rule would extend to reversionary interests. In *Andrews v. Wall*, 6 Vin. Abr. 237. the surrender was supplied. In *Hawkins v. Leigh*, 1 Atk. 387. Lord Hardwicke thought the will did not pass copyholds, therefore the point was not determined. *Taylor v. Taylor*, 1 Atk. 386. is incorrectly reported, for there two thirds of the copyhold were given to the wife, which the reporter does not state. Lord Hardwicke there directed the surrender to be supplied, which is a case of supplying a surrender against the heir, who took nothing from the second brother. *Smith v. Baker*, 1 Atk. 385. compares the rule to an heir in blood, and no other distinction is there made. *Hervey v. Hervey*, 1 Atk. 564. shews that one branch of a family shall not be provided for by the ruin of another. *Macey v. Sharmur*, 1 Atk. 389. Surrender supplied. *Vide also* on same subject *Roome v. Roome*, 3 Atk. 181. *Goodwyn v. Goodwyn*, 1 Ves. 226. *Tudor v. Anson*, 2 Ves. 582. which (it seems) are all the cases reported.

The principle of this may be

98. A surrender must be supplied for children wherever the heir is provided for, though the provision be not from the testator.

T. 1791, cor. Thurlow, C.
Fyke v. White,
3 Bro. Ch. Ca. 288.

M. 1795, cor. M. R.
Crickett v. Dalby, 3 Ves. jun. 12.

79. The court will not supply a defective surrender of a copyhold estate for a natural child; but, if it has a legacy from the father, payable at twenty-one, will allow maintenance.

3 Mar. 1796, cor. Loughb. C.
Rumbold v. Rumbold, 3 Ves. 69.

80. Testator devised all the residue of his estates, as well copyhold as freehold, "the copyhold part thereof having been previously surrendered to the use of my will," upon several trusts, in favour of his wife and children. The only trust for his eldest son and heir was an annuity of 300*l.* for life, remainder to his wife and children. The testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass, and the annuity being much more valuable, the heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity while abroad.

In this case Lord Chancellor observed, that the idea of supplying a surrender began after the stat. of 43 *Eliz. c. 4.* upon charities under commissions of charitable uses: they also supplied recoveries.

7 July 1796, cor. M. R.
Wilson v. Mount,
 3 Ves. jun. 191—194.

81. Testator devised several estates specifically, and all other his freehold and copyhold lands and hereditaments "whereof I shall die seised or possessed, (the copyhold part whereof I have surrendered to the use of my will,)" upon trust to sell, and the produce thereof to be considered as part of his personal estate, and be disposed of subject to his debts. Upon a bill by the creditors, a reference was made to the Master, who reported, that part of the copyholds had been surrendered and other part not surrendered. A question then arose, Whether the copyholds not surrendered passed? *Per M. R.* If the testator did intend to devise all the copyhold estate, whether surrendered or not, the clause in the parenthesis must be a mistake, and considered as mere surplusage. His Honor said he was not at liberty to indulge any conjecture, if it was beyond doubt that testator could not have meant these words to be restrictive. The case of *Gascoigne v. Barker* (a) was as strong as could well be stated: the question there was the same as in this, Whether the parenthesis, which appeared to his Honor to be little more than an allegation, was to be taken as restrictive? Every argument that could apply in that case applies to the present. It was not necessary to consider the parenthesis

(a) 3 Atk. 8.

parenthesis as more than an assertion. It is enough to say it may operate as a restriction. A testator shall not be supposed to pass what he cannot pass. If testator had said all his copyhold lands, it must have been taken whether surrendered or not, but the description is doubtful. Fortified by the cited case, his Honor could not say that testator had given any but such as were surrendered. The result of all the cases cited before Lord Hardwicke (a) is, that if a *videlicet* is repugnant to what has gone before, it shall be rejected; but if it can be reconciled and made restrictive, it shall be so. Upon the whole, if Lord Hardwicke was right in the cited case, as his Honor thought he was, there is not sufficient to warrant a determination that the testator meant to pass the copyhold estate; therefore it descends to the heir.

(a) Hob. 171. March 31. 47. Dy. 376. *utile per inutile non vitiatur.*

82. A devise of a copyhold (duly surrendered) to A. and his heirs, in trust for B. and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs.

11 May 1798, cor. Loughb. C. *Williams v. Lord Londale*, 3 Ves. jun. 752.

It seems a mandamus will not lie to compel the lord to admit to a copyhold. Yet in *Rex v. Lord of Hendon Manor*, 2 Term Rep. 484. a mandamus was granted. So in *Rex v. Rennet*, 2 Term Rep. 198. but the doctrine was not submitted to. Lord Chancellor in this case doubted his jurisdiction upon the same reasoning which supports *Burgess and Wheate*, 1 Blackst. 123. In Com. Dig. and Eq. Ca. Abr. tit. *Copyholder*, it was said there are many cases establishing the jurisdiction of this court to compel the lord to admit. As to the claim of the trustee where the objects of the trust fail, *vide Barclay v. Russell*, 3 Ves. jun. 424. *Walker v. Denne*, 1 Ves. jun. 170.

SEC. 4. By what Words in a Will a Copyhold Estate may be said to pass, the same having been previously surrendered, (or the Want of such Surrender supplied); and who shall take the Benefit of the Surrender.

1. S. M. having issue three daughters, B., C., and D., and having freehold lands in A., J., and W., and copyholds in J. (some of which he had surrendered to the use of his will,) he made a will, and devised part to trustees for charities, and to each of his two daughters, C. and D., he devised distinct parts of his freehold lands, money, and legacies; to his wife, the house he lived in and several closes by name, till his daughter B. should attain 21, and then are these words;
“ And

H. 1711, cor. King, C. *Andrews v. Waller*, 2 Eq. Abr. 233. pl. 19. 6 Vin. Abr. 237. pl. 12.

Upon the appeal it was objected that the copyhold lands did not pass, and that equity ought not to aid a surrender to the prejudice of two other sisters, who with plaintiff were heirs at law, and plaintiff better provided for than they, *exclusive* of the copyhold; and here there were other freehold lands whereon the general words

might operate. But Lord Chancellor said, the rule of evidence is the same here as at law; the proper evidence of surrenders or titles to a copyhold is the court roll, or a copy of it, or it must appear they existed once and are lost, &c. and so make way to go into parol evidence. — Plaintiff has no title at law, and as to an equity title, if it does not appear to be the testator's intent to give his copyhold to B. the court ought not to give it, but must expound and collect testator's intent from the words of the will. It is clear that the general words, viz. "of all other," will take in the rest of the copyhold as well as freehold: as to cases where the surrender is not supplied, they stand upon this reason, that the intention could not be collected to give lands to uses to which testator could not give them; but when the intention can be collected, though there are improper words, yet they pass in the consideration of this court, where if there had been a surrender, they would have passed in favor of creditors, &c. And his lordship was of opinion that the testator intended to comprise copyhold in the devise to his daughter B. And if he did, the rule is general, that such devise is good to a wife, younger children, or creditors; but objected, that B. is not the youngest child; she is indeed eldest, but piece of a whole heir at law; and if sole heir, yet it is common in cases of portions that the eldest is considered as the youngest, if not provided for. In case of Borough English the youngest must be considered as heir: so in gavelkind. In regard to what does not descend in common they stand in the place of younger children; to determine otherwise would be to determine on words, and not according to the nature of things. As to the provision made for B. his lordship said he did not know that the court had gone minutely into the consideration of that, &c. otherwise where the heir is totally disinherited. In *Bosi v. Bosi*, 1 Eq. Abr. 124. the heir had but 6 l. per ann. et de minimis non curat lex, and in effect a total disinheritance: but where there is a provision not unreasonable, and where the heir is not left in a despicable condition, the court has not gone so far. In *Burton v. Floyd*, 1 Bro. P. C. 544. it was laid down by Lord Harcourt in the strongest terms, and there after an estate tail a surrender was supplied; and here defendant's claim another estate by the same will, and where a devisee claims a part, he must take the whole or reject the whole, according to the will. The quantum of a provision for a child is in the father's power and discretion. A man is bound by nature to provide for all his children, and in this case the father had provided for two and intended to provide for the third; he intended to make a complete provision, and give all that he had among his three daughters, and to leave nothing to descend. Per Lord Chancellor. Ibid.

(a) *Quere*, if it should not be *unprovided*.

24 Nov. 1740, cor. Hardw. C.
Tendril v. Smith, 2 Atk. 85.
Vide Smith v. Baker, 1 Atk. 386.

6 April 1744, cor. Hardw. C.
Car v. Ellison, 3 Atk. 73.

* Lord Chancellor said these words were large enough to pass

"And after then, the house and grounds, and all other my messuages, cottages, lands, tenements, and hereditaments whatsoever in A., J., and W. and not herein before otherwise disposed of, with their and every of their appurtenances, unto my said daughter B., and to the heirs of her body, to enter upon at her age of 21, and not sooner." (Note: there was some copyhold in A.) B. married plaintiff. Upon a bill by them for an injunction, and to have the want of a surrender supplied. Question 1st, Whether the words of the will were sufficient to pass the copyhold in A. to the daughter B.? 2dly, If equity should supply the want of a surrender in this case? Held at the Rolls, that the copyhold not devised to charities did pass by general words to plaintiff B., and that equity should supply the want of a surrender. Decreed accordingly, and a perpetual injunction. On an appeal, Lord Chancellor affirmed the decree. An ejectment was tried before Cowper, J., and a case made for the opinion of C. B., where it was held, that the words were sufficient to pass the copyhold; and the Master of the Rolls was of the same opinion. And as to the second point, the parent is the proper judge of the provision for his children, and here are no children provided (a) for. Decree affirmed by Lord Chancellor.

she is indeed eldest, but piece of a whole heir at law; and if sole heir, yet it is common in cases of portions that the eldest is considered as the youngest, if not provided for. In case of Borough English the youngest must be considered as heir: so in gavelkind. In regard to what does not descend in common they stand in the place of younger children; to determine otherwise would be to determine on words, and not according to the nature of things. As to the provision made for B. his lordship said he did not know that the court had gone minutely into the consideration of that, &c. otherwise where the heir is totally disinherited. In *Bosi v. Bosi*, 1 Eq. Abr. 124. the heir had but 6 l. per ann. et de minimis non curat lex, and in effect a total disinheritance: but where there is a provision not unreasonable, and where the heir is not left in a despicable condition, the court has not gone so far. In *Burton v. Floyd*, 1 Bro. P. C. 544. it was laid down by Lord Harcourt in the strongest terms, and there after an estate tail a surrender was supplied; and here defendant's claim another estate by the same will, and where a devisee claims a part, he must take the whole or reject the whole, according to the will. The quantum of a provision for a child is in the father's power and discretion. A man is bound by nature to provide for all his children, and in this case the father had provided for two and intended to provide for the third; he intended to make a complete provision, and give all that he had among his three daughters, and to leave nothing to descend. Per Lord Chancellor. Ibid.

2. A copyhold surrendered to the use of a will, passes by a general devise of lands, notwithstanding there are freeholds.

3. C. gave all his messuages, lands, tenements, and hereditaments in A.; and elsewhere in the county of D., and all other his real estate* to trustees, &c. for 500 years, for particular purposes;

§ 4. By what Words devisable, and who shall take. C—o 287

pos; and after the determination of the term the copyhold lands of the testator. he gave all the premises to his wife for her life, Sic in *Smith v. Baker*, 1 Atk. without impeachment of waste. All the estates 386. and (n.) coming originally from the wife, the testator could not mean to sever the copyhold from the freehold, therefore by the general words of the will the copyhold lands passed.

A person who has the beneficial interest only, in copyhold estates, may devise them, and they pass by his will as well as any other lands (a); for he could not surrender them without having the legal estate.

(a) *Vide* *Tufuel v. Page*, 2 Atk. 37. *King v. King*, 3 P. Wms. 360. *Macey v. Shurmer*, 1 Atk. 390. *Allen v. Poulton*, 1 Vesf. 121. *Macnamara v. Jones*, 1 Bro. Ch. Ca. 431.

A steward's indorsing upon a surrender of a copyhold the uses of it, is sufficient, without specifying them in the court rolls.

The court will supply a surrender of a copyhold, where there is a charge upon it for the payment of debts.

Vide *Harris v. Ingledew*, 3 P. Wms. 98. and notes.

3. A nominal manor will pass under the words, messuages, lands, tenements, and hereditaments.

28 April 1744, cor. Hardw. C. *Norris v. Le Neve*, 3 Atk. 82.

4. If a man devises all his lands and tenements, only freehold land will pass; yet if he has nothing but copyholds, they shall pass (b).

1 Aug. 1744, cor. Hardw. C. *Ex parte Caswall*, 1 Atk. 560. (b) *Vide* *Smith v. Baker*, 1 Atk. 386.

5. A. devised all his estate subject to the payment of his debts. He had no freehold lands, and his copyholds were not surrendered to the uses of his will. The want of this surrender was supplied in equity in favour of the creditors; but it would have been otherwise if there had been any freehold estates.

28 Feb. 1749, cor. Hardw. C. *Libell v. Beane*, 1 Vesf. 215.

6. A copyhold estate, though not particularly specified in a surrender to the uses of a will, may pass by the general introductory words thereof, by which there appeared a plain intent in the testator to dispose of his whole estate and to leave no part to descend.

11 Mar. 1747, cor. Hardw. C. *Goodwyn v. Goodwyn*, 1 Vesf. 227. *Vide* *Ibbetson v. Beckwith*, Ca. temp. Talb. 157.

7. Where copyhold lands are surrendered to the use of a will, and the surrenderer makes a will and appoints the uses, the law says, the lands pass by the surrender, and the will is only directory of the uses: though the lands are so appointed, if the appointee died in the life of the testator, it was never thought he could take the benefit of it, which

26 Nov. 1750, cor. Hardw. C. *Duke of Marlborough v. Lord Godolphin*, 2 Vesf. 77.

might operate. But Lord Chancellor said, the rule of evidence is the same here as at law; the proper evidence of surrenders or titles to a copyhold is the court roll, or a copy of it, or it must appear they existed once and are lost, &c. and so make way to go into parol evidence. — Plaintiff has no title at law, and as to an equity title, if it does not appear to be the testator's intent to give his copyhold to B. the court ought not to give it; but must expound and collect testator's intent from the words of the will. It is clear that the general words, viz. "of all other," will take in the rest of the copyhold as well as freehold: as to cases where the surrender is not supplied, they stand upon this reason, that the intention could not be collected to give lands to uses to which testator could not give them; but when the intention can be collected, though there are improper words, yet they pass in the consideration of this court, where if there had been a surrender, they would have passed in favor of creditors, &c. And his lordship was of opinion that the testator intended to comprise copyhold in the devise to his daughter B. And if he did, the rule is general, that such devise is good to a wife, younger children, or creditors; but objected, that B. is not the youngest child: she is indeed eldest, but eldest of a whole heir at law; and if sole heir, yet it is common in cases of portions that the eldest is considered as the youngest, if not provided for. In case of *Borough English* the youngest must be considered as heir: so in gavelkind. In regard to what does not descend in common they stand in the place of younger children; to determine otherwise would be to determine on words, and not according to the nature of things. As to the provision made for B. his lordship said he did not know that the court had gone minutely into the consideration of that, &c. otherwise where the heir is totally disinherited. In *Bosi v. Bosi*, 1 Eq. Abr. 124. the heir had but 6 l. per ann. et de minimis non curat lex, and in effect a total disinheritance: but where there is a provision not unreasonable, and where the heir is not left in a despicable condition, the court has not gone so far. In *Burton v. Floyd*, 1 Bro. P. C. 544. it was laid down by Lord Harcourt in the strongest terms, and there after an estate tail a surrender was supplied; and here defendants claim another estate by the same will, and where a devise claims a point, he must take the whole or reject the whole, according to the will. The quantum of a provision for a child is in the father's power and discretion. A man is bound by nature to provide for all his children, and in this case the father had provided for two and intended to provide for the third; he intended to make a complete provision, and give all that he had among his three daughters, and to leave nothing to descend. Per Lord Chancellor. Ibid.

(a) *Quere*, if it should not be unprovided.

24 Nov. 1740, cor. Hardw. C.
Tendril v. Smith, 2 Atk. 85.
Vide Smith v. Baker, 1 Atk.
 386.

6 April 1744, cor. Hardw. C.
Car v. Ellison, 3 Atk. 73.

• Lord Chancellor said these words were large enough to pass

2. A copyhold surrendered to the use of a will, passes by a general devise of lands, notwithstanding there are freeholds.

3. C. gave all his messuages, lands, tenements, and hereditaments in A., and elsewhere in the county of D., and all other his real estate* to trustees, &c. for 500 years, for particular purposes;

poses; and after the determination of the term he gave all the premises to his wife for her life, without impeachment of waste. All the estates coming originally from the wife, the testator could not mean to sever the copyhold from the freehold, therefore by the general words of the will the copyhold lands passed.

A person who has the beneficial interest only, in copyhold estates, may devise them, and they pass by his will as well as any other lands (a); for he could not surrender them without having the legal estate.

(a) *Vide* Tufuel v. Page, 2 Atk. 37. King v. King, 3 P. Wms. 360. Macey v. Shurmer, 1 Atk. 390. Allen v. Poulton, 1 Ves. 121. Machamara v. Jones, 1 Bro. Ch. Ca. 481.

A steward's indorsing upon a surrender of a copyhold the uses of it, is sufficient, without specifying them in the court rolls.

The court will supply a surrender of a copyhold, where there is a charge upon it for the payment of debts.

Vide Harris v. Ingledew, 3 P. Wms. 98. and notes.

3. A nominal manor will pass under the words, *messuages, lands, tenements, and hereditaments*.

28 April 1744, cor. Hardw. C. Norris v. Le Neve, 3 Atk. 82.

4. If a man devises all his lands and tenements, only *freehold* land will pass; yet if he has nothing but *copyholds*, they shall pass (b).

1 Aug. 1744, cor. Hardw. C. *Ex parte Caswall*, 1 Atk. 560. (b) *Vide* Smith v. Baker, 1 Atk. 386.

5. A. devised all his estate subject to the payment of his debts. He had no freehold lands, and his copyholds were not surrendered to the uses of his will. The want of this surrender was supplied in equity in favour of the creditors; but it would have been otherwise if there had been any freehold estates.

28 Feb. 1749, cor. Hardw. C. Libell v. Beane, 1 Ves. 215.

6. A copyhold estate, though not particularly specified in a surrender to the uses of a will, may pass by the general introductory words thereof, by which there appeared a plain intent in the testator to dispose of his whole estate and to leave no part to descend.

11 Mar. 1747, cor. Hardw. C. Goodwyn v. Goodwyn, 1 Ves. 227. *Vide* Ibbetson v. Beckwith, Ca. temp. Talb. 157.

7. Where copyhold lands are surrendered to the use of a will, and the surrenderer makes a will and appoints the uses, the law says, the lands pass by the surrender, and the will is only directory of the uses: though the lands are so appointed, if the appointee died in the life of the testator, it was never thought he could take the benefit of it, which

26 Nov. 1750, cor. Hardw. C. Duke of Marlborough v. Lord Godolphin, 2 Ves. 77.

which must have often happened; considering the number of such wills; and yet it was never contended that it would vest in an appointee dying in the life of the testator, because the act was not complete, it being no will till his death, and consequently when it should vest there is no person to take.

15 Feb. 1751, cor. M. R.
Byas v. Byas, 2 Ves. 164.

8. A copyhold surrendered to the use of a will passes by the general words *all my real estate*; but otherwise, if not surrendered, unless testator had only copyhold and no freehold estate. Where a copyhold is expressly devised, the want of surrender is supplied in equity for the benefit of a wife, children, or creditors; but for no other persons. An heir general or by custom must not be disinherited by implication or inference from the particular wording of a will.

26 Feb. 1756, cor. Hardw. C.
Wards v. Wards, Amb. 299.

9. *W.* made his will, and reciting *that he was seised of a copyhold estate*, (which in fact he was not,) devised all his real estate, &c. He afterwards purchased a copyhold estate, and surrendered it to such uses as he by will *should appoint*, and died without making any other will. Held, that the copyhold did not pass by the will; 1st, because the surrender was to a future appointment (a); 2dly, because the words do not extend to an after-purchased copyhold, but only to such as he was seised of at the time of making the will.

(a) *Vide Carte v. Carte*,
Amb. 28.

T. 1785, cor. Thurlow, C.
Read v. Crop; 1 Bro Ch. Ca. 491.

10. Testator devised estates which he had surrendered in several parishes (describing them) to his wife for life, with remainders over. In one of the parishes he had a joint estate with his wife, and in others he had no estate but in her right; the estates of the wife not passing by the surrenders, do not by the will. The words of the will are too loose to raise a construction that the wife should elect.

M. 1790, cor. Thurlow, C.
Lindopp v. Eborall,
3 Bro. Ch. Ca. 188.

11. A copyhold estate will not pass by general description *where there is freehold to satisfy* the words of testator's will, even though it had been supposed to be a freehold, and devised first for payment of debts, and then to a younger child otherwise provided for.

SEC. 5. How far Copyhold Estates are rendered liable to the Payment of Debts and Legacies, and whether they shall be considered Assets by Descent in the Hands of the Heir.

1. A Man seised of freehold and copyhold lands devises both for payment of debts and legacies, but the copyhold was not surrendered to the use of his will, and the freehold was sufficient for the debts. The question was, Whether the court would supply the want of a surrender, and lay the legacies on the freehold, and the debts on the copyhold, as when there are simple contract creditors, and bond or judgment creditors, and personal assets not sufficient to pay both?—The Master of the Rolls held, that the want of a surrender could not be supplied for the sake of the legatees; and said, it was never yet done, especially where they are mere strangers, as in this case.—And dismissed the bill.

H. 1699, cor M. R.
Rafter v. Stock,
 1 Eq. Abr. 123. pl. 12.
Vide Mallabar v. Mallabar, Ca.
 temp. Talb. 78.

2. In this case it was insisted, that a trust of a copyhold cannot be assets in the hands of the heir, because the copyhold itself cannot be assets; and therefore that being a privileged estate, the trust will follow the nature of it. But by Lord Chancellor—A surrender to one and his heirs, in trust for another and his heirs, breaks the custom. He said, if a copyholder in *Borough-English* surrenders in trust for himself and his heirs, the trust goes to the heirs at law; therefore he took it, that the trust in the hands of the heir is assets.

T. 1707, cor. Cowper, C.
Holley v. Holley,
 2 Eq. Abr. 509. pl. 4.

3. Bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest. The defendant insisted to have a judgment, which he had assigned to him, first satisfied before plaintiff should redeem. *Per cur.*—Copyhold lands are not liable to an execution upon a judgment; ergo, the judgment shall not be tacked to the mortgage in this case, but the plaintiff shall redeem upon payment of principal, &c. without satisfying the judgment.

P. 1715, cor. Cowper, C.
Heir of Cannon v. Pack,
 2 Eq. Abr. 216. pl. 6.
 6 Vin. Abr. 222. pl. 6.

4. A man seised of some freehold estates, and also of a copyhold estate, devised all his real and

T. 1715, cor. Cowper, C.
Cballis v. Castborn,
 1 Eq. Abr. 123. pl. 13.

Præ. in Ch. 407.
Gilb. Eq. Rep. 96.
Vide Lord Paulet v. Parry.
Præ. in Ch. 449. *Drake v. Robinson*, 1 P. Wms. 443. *Gibson v. Coombs*, 1 Bro. Ch. Ca. 273.

personal estate for the payment of his debts, and died without any surrender of the copyhold estate. And the freehold and personal estate not being sufficient for the payment of the debts, it was urged that a surrender should as well be supplied in this case, as if no freehold estate had been devised at all. But Lord Chancellor said, he thought the precedents had not gone so far, and that he could not relieve in this case, principally, because the testator's intention did not appear to him to pass the copyhold estate by a devise of his freehold, a copyhold being of the lowest regard, and looked upon in the eye of the law but as an estate at will.

M. 1717, cor. Cowper, C.
Furaker v. Robinson,
Præ. in Ch. 477.
Gilb. Eq. Rep. 130.
 1 *Eq. Abr.* 123. pl. 9.

5. A copyhold estate cannot be affected by a judgment, much less by a covenant, for further assurance, which goes along with the estate, and does not bind the heir of the copyhold.

T. 1718, cor. Ldg. Comrs.
Drake v. Robinson,
 1 P. Wms. 443.

(a) Lord Chancellor said the testator's intention was to be honest, and he had made choice of words large enough to provide for his debts. A copyhold is a *real estate*; and to cram the testator's design by a narrow construction, would be to make him a knave against his will. *Vide* Hatlewood v. Pope, 3 P. Wms. 322. *Mallabar v. Mallabar*, Ca. temp. Talb. 78.

6. One devised *all his real estate* (a) to pay debts, having part freehold and part copyhold, and died without having surrendered the copyhold to the use of his will; regularly, the copyhold shall not pass without being mentioned; and if mentioned, equity will, on behalf of the creditors, supply the want of a surrender. But Lord Chancellor directed the Master to inquire, first, if the freehold estate be sufficient to pay the debts (b); and if not, then the copyhold, being *real estate*, was decreed liable.

(b) *Vide* Harris v. Ingledeu, 3 P. Wms. 96.

P. 1727, cor. King, C.
Legg v. Turnbull, 2 P. Wms. 409.
 2 *Eq. Abr.* 691. pl. 4.

7. A copyholder in fee by will charged his lands with his debts, the lands being in *England*, and the heir an infant in *Scotland*. The creditors brought a bill to have their debts paid out of the copyhold premises; whereupon the heir appeared, and there was an attachment against him for want of an answer; but he being an infant, the next step was to bring up the body. The heir, however, being out of the reach of the process of the court, the plaintiff could not bring up the body. Decreed, therefore, that the infant should answer by a certain time, or shew cause why a receiver should not be appointed.

H. 1730, Scacc.
Whitehead v. Harrison,
 1 *Barn. Rep. in B. R.* 431.
 2 *Eq. Abr.* 712. pl. 1.

8. An ejectment having been brought of lands which sequestrators had got possession of, a bill was preferred to revive the sequestration, and likewise

wife an injunction was prayed to stay proceedings in the ejectment. Upon motion that the sequestration might be revived, it was admitted, that it was taken partly upon copyhold lands and partly upon freehold, and that the defendant in the original suit was dead; but yet it was contended, that the sequestration was proper to be revived in the hands of the heir, as to the whole lands: admitted also, that this was a sequestration on a decree, and that such sequestrations were but of late date (they began in Lord *Nottingham's* time, in the court of Chancery, and were not allowed in this court till the 14th June 1687, in the case of *Fountain and Wavers*); that it did abate by the party's death; but as to the freehold, it was certain it might be revived; and as to the copyhold, it was submitted the law was the same, it being well known that such process runs upon these lands, though the process of *elegit* at law does not. *Per cur.*—I though it is true sequestrations run upon copyholds, yet it is to be doubted whether it can be revived in the hands of the heir as to such lands; for if it be, the heir will not take up the lands, and the lord will be without a tenant. Wherefore decreed that the injunction do continue only as to the freehold lands, and be dissolved as to the copyhold, with liberty to apply to the court again.

9. If a man devises all his lands and hereditaments in *Dale*, and has a manor in *Dale* also, the manor, as it is a hereditament in *Dale*, will pass; but if one has a manor in *Dale*, and also land there which is not parcel of the manor, it is doubtful whether the manor will pass by a devise of *all his lands*.

If a man has freehold and copyhold lands in *Dale*, and devises all his lands and hereditaments in *Dale* in trust to pay his debts and legacies, his freeholds only will pass; for his will must be intended of such lands and tenements as are deviseable in their nature. *Secus*, if the testator had surrendered his copyholds to the use of his will, because this shews he did intend to devise his copyholds (a). But even in the first case, if the freeholds were not sufficient to pay his debts, when the testator devises all his lands in trust to pay his debts, it seems rather than the debts should go unpaid, that the copyhold shall in equity pass (b).

U 2

10. J. S.

T. 1734, cor. Talbot, C.
Hastwood v. Pope,
3 P. Wms. 322.
2 Eq. Abr. 234. pl. 20.
Vide Drake v. Robinson, 1 P.
Wms. 443. *Mallabar v. Mallabar*,
Ca. temp. Talb. 73.

(a) *Goodwyn v. Goodwyn*,
1 Ves. 226.

(b) *Harris v. Ingledew*, 3 P.
Wms. 96.

P. 1735, cor. Talbot, C.
Mallabar v. Mallabar,
 Co. temp. Talb. 78, 9.
 2 Eq. Abr. 234. pl. 21.
Vide Drake v. Robinson, 1 P.
 Wms. 443. *Hallewood v. Pope*,
 3 P. Wms. 322.

10. *J. S.* devises his real estate to be sold to pay debts and certain pecuniary legacies; and, subject thereto, devises his personal estate to his sister. Lord Chancellor refused to supply the defect of a surrender of the copyhold to the use of his will against the heir, if the other estates would suffice to pay the debts; and dismissed the bill with costs as to this point, it having been confessed by the answer that testator's other estate (exclusive of the copyhold) was more than sufficient to pay the debts.

21 Nov. 1739, cor. Hardw. C.
Bateman v. Bateman and others,
 1 Atk. 421.
Vide Galton v. Hancock,
 2 Atk. 424. 427. 430. and notes,
 3d edit.

11. A *proviso* in the will of *R. B.* that if his personal estate at *W.* should not pay his debts, then *his executors to raise the same* out of his copyhold premises. The rents not being sufficient to discharge testator's debts, these words will give the trustees a power to sell the copyhold lands to satisfy his intention of paying his debts.

3 May 1751, cor. Hardw. C.
Earl of Godolphin v. Penneck,
 2 Ves. 271, 272.

12. *F. P.* by his will, declared he would make a disposition of his whole estate and effects. The first disposition was, that all his debts should be paid, and then testator devised particular parts of his estate (subject thereto) among particular persons. Testator held certain lands of the manor of the Duchy of Cornwall, which were mentioned in his will, in distinct parts from the rest of the fee simple lands. Testator had surrendered these customary lands to *B. P.*, who declared a trustee thereof by deed, for several persons and for the use of such as testator should appoint. Upon a bill by testator's creditors to have a satisfaction for their debts out of his real and personal estate, a question arose, Whether the customary lands were liable to the debts? *Per Lord Chancellor*—The single question will rest on the construction of the will, resulting from the acts of the testator. Testator had done sufficient to subject them to any act by his will; for as these customary lands (and so of copyhold) are subject to have a trust declared that will affect them, the true construction of the will is, that all the lands devised are made subject to debts. It is the rule of law, and more strongly so of equity, that such a construction is to be made of wills as will best attain the satisfaction of just debts. In this case the first disposition runs over all the subsequent clauses in the will. Lord Chancellor said the testator's intent was,

that

that every thing given by his will should be subject to his debts, consequently the trust of the lands in question must be subject as well as the rest (a), notwithstanding they are mentioned in distinct parts of the will.

(a) *Vide Legh v. Earl of Harrington*, 2 Eq. Abr. 372. pl. 19. 4 Bro. P. C. 90.

13. A copyhold estate, where the lands settled are to be held *without impeachment of waste*, is not applicable in performance of a covenant in marriage articles, to settle such lands on a wife for life.

10 May 1751, cor. Hardw. C. *Pinnel v. Hallet*, Amb. 105. 1 Eq. Abr. 26.

14. One having contracted for a copyhold estate, devised it and a freehold estate to his son, subject to an annuity to his wife: the son confirmed the annuity, and the wife released the freehold and copyhold: *the son was admitted to the copyhold as heir at law*, and surrendered it to a mortgagee: held, that the mortgage should be preferred to the annuity; the mortgagee having a legal interest, and the annuitant only an equitable one.

31 July 1753, cor. Hardw. C. *Wilson v. Strafford*, Amb. 181.

15. Copyhold lands are not liable to be seised upon an outlawry, because prejudicial to the lord of the manor.

T. 1758, in Scacc. *Rex v. Budd, Parker* 190.

Copyhold lands are not liable to be seised upon an extent.

Vide Rex v. Lord Viscount Lisle, T. 23 Jac. 1. cited.

16. Under a general charge upon all testator's worldly estate for payment of debts, copyhold lands are liable as well as freeholds, for *the law follows the intention of the testator*. If a freehold estate were devised to one person, and a copyhold to another, the freehold might be first applied, though both are unnatural funds for the payment of debts.

P. 1783, cor. Lds. Comrs. *Coombes v. Gibbon*, 1 Bro. Ch. Ca. 273.

17. Under a general charge upon land for payment of debts, where the testator had freehold and copyhold estates, the copyhold is liable.

P. 1791, cor. Buller, J. abs. C. *Kentish v. Kentish*, 3 Bro. Ch. Ca. 257. *Vide Coombes v. Gibbon*, 1 Bro. Ch. Ca. 273.

18. A fraudulent surrender of a copyhold estate is not an act of bankruptcy under 1 Jac. 1. c. 15. s. 2., for no process can issue to levy a debt on a copyhold estate.

H. 1792, cor. Thurlow, C. *Ex parte Cockshott*, 3 Bro. Ch. Ca. 501.

For cases of debts due on the mortgage of copyhold estates, see *post* tit. *Mortgage*.

For the cases in which equity will supply a surrender in favour of creditors, see *ante* sec. 3.

By what words in a will a copyhold shall be rendered liable to debts, see *ante* sec. 4.

SEC. 6. Of the Estate of the Lord, and of the Cases in which the Lord's superior Estate shall protect the lesser Estate of his Tenant.

M. 1671, Canc.
Mildmay v. Hungerford,
2 Vern. 243.

1. PLAINTIFF being tenant for life of a copyhold estate, remainder to his first and other sons in tail, remainder to defendant in fee, took from defendant a surrender of the reversion in fee to his own use, though his wife was then *privement ensient* of a son. The contingent remainder was not destroyed by this surrender, in regard the freehold was in the lord.

H. 1711, cor. M. R.
Mason v. Day, *Gib. Eq. Rep.* 77.
2 Eq. Abr. 494. pl. 7.

2. A feme purchased a church lease to her and her heirs for three lives, and died, leaving an infant daughter; two of the lives died; the guardian renewed the lease, and then the infant died. This new lease was held a new acquisition and vested in the daughter as a purchaser, and to go to the heirs on the part of the father; the renewal by the archbishop being gracious and spontaneous, and not like a copyhold, for there the lord is only a trustee for the heir, and is bound to admit him; though the lord be the original grantor, yet it is only in virtue of the trust reposed in him by the law for that purpose; and decreed accordingly. Lord *Harcourt* was of the same opinion.

M. 1720, Canc.
Anon. 2 Eq. Abr. 167. pl. 15.
6 Vin. Abr. 239. pl. 5.

3. Where a bill is brought for surrender of a copyhold estate held for lives, the lord must be made a party; because, when the surrender is made, the estate is in the lord, and he is under no obligation to new grant it; *contra* in case of copyholds of inheritance, for there the lord need not be a party.

13 July 1766, cor. King, C.
Lloyd v. Bartlett,
2 Eq. Abr. 228. pl. 13.
6 Vin. Abr. 183. (x. d.) pl. 1.

4. The lord of a manor brought his bill, claiming an house built upon the waste. Lord *Chancellor* said, that the lord of a manor is never said to be out of possession; that what is built upon the

the waste is his; and that upon a trial before Justice (John) Powell, touching some cottages built upon the waste, though the lord had not been in actual survey (a) of the cottages in question for 60 years, and there had been several fines levied thereon: by the opinion of the judge the lord had a verdict (b).

(a) *Quere*, if it should not be possession?

(b) It has been ruled in evidence at the assize, that a cot-

tager on the lord's waste lives there by the lord's consent, and so is only a tenant at will: but this is very doubtful where there has been a long possession. *Per Pratt, C. J. M. 11 Geo. 1. B. R.* And *per cur.*—Twenty or twenty-five years' possession is a good title in an ejectment, as well as a bar to an ejectment. *Ibid.*

5. A bill was brought for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son in the penalty of 100*l.* that the son should not commit any trespass in the Duke of Beaufort's Royalty, by shooting, hunting, fishing, &c. except with the licence of the gamekeeper, or in company with a qualified person. The son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty, &c. The gamekeeper's brother-in-law, and another servant of the Duke's, asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict was found merely on their evidence. Lord Hardwicke decreed the plaintiff should be relieved against the verdict, and that the Duke should refund the 100*l.* recovered on the bond, and the 40*l.* costs of suit.

5 June 1741, cor. Hardw. C.
Roy v. Duke of Beaufort,
2 *Atk.* 190.

Bonds for the preservation of game, and to prevent poaching, are not only for the benefit of lords of manors, but for those also who enter into them, for that sort of idleness leads to worse consequences.

The present act of the son is not *malum in se*, and there is no statute which directs the taking of such bonds to prevent the like offences for the future, as in the case of deer-stealing, or the statutes which relate to the customs, and which direct and command the taking of such bonds.

6. To support a contingent remainder in a freehold, there must be a tenant of the freehold, against whom a *præcipe* may be brought; otherwise as to a copyhold, for there no *præcipe* can be brought, being parcel of the manor only, and the freehold in the lord.

23 Nov. 1743, cor. Hardw. C.
Lowell v. Lowell, 3 *Atk.* 13.

13 April 1749, cor. Hardw. C.
Taylor v. Philips, 1 Ves. 229.

7. A feme covert, in her husband's presence, but without his joining, surrendered her copyhold to the use of her will or appointment, and then devised it to A. The fact of the surrender not being before the court, it was sent to be tried. Lord Hardwicke doubted how far this surrender could be good to the use of the will: the person must take the lands by the surrender, of which the instrument of appointment only directs the uses; because he must come under the estate of the lord, and by that medium there must be a surrender into the hands of the lord, to make an appointment effectual, whether it is to take place immediately or in future.

T. 1793, cor. Loughb. C.
Habergbam v. Vincent,
2 Ves. jun. 209.
4 Bro. Ch. Ca. 353.

8. Contingent remainders of copyhold estates will be preserved against a forfeiture by the estate in the lord; not where the preceding estates are expired.

SEC. 7. Of the Lord's Court—Of Fines levied and Recoveries suffered, and other Suits and Proceedings therein; and also of barring Estates-Tail by Surrender.

H. 1615, cor. Jeffries, C.
and M. R.
Appe v. Regie & al.
1 Eg. Abr. 119. pl. 5.
Vern. 167.

If there had been an error in any adversary proceeding in the lord's court, equity would have ordered the lord to examine it.

1. A BILL will not lie to compel a lord of a manor to permit the plaintiff to bring a plaint in the lord's court, in nature of a writ of error, to reverse an erroneous common recovery suffered there.

25 Feb. 1695, Dom. Proc.
Smith & Ux. v. Dean and Chapter of St. Paul's and another,
Show. P. C. 67.

2. Bill filed to compel the dean and chapter, as lords of the manor, to receive a petition in nature of a writ of false judgment, for reversing a common recovery suffered in the manor court, whereby a remainder in tail, under which the plaintiff claimed, was barred; suggesting several errors in the proceedings therein. One of the defendants demurred; and the dean and chapter, by their answer, insisted that it was the first attempt of the kind, and of very dangerous consequence, and therefore conceived it not fit to proceed on said petition, unless compelled by a course of law.

In chancery the demurrer was heard and ordered to stand, and by the lords the appeal was dismissed, and the dismissal below confirmed.

§7. *Of the Lord's Court—Fines and Recoveries.* C—o 297

3. *A* being tenant in tail of the trust of a copyhold estate, with remainder over; and the trustees refusing to surrender the legal estate to him, he brought his bill for that purpose, and, pending the suit, went to the lord's court and offered to surrender, but was refused, not having the legal estate; and thereupon he made his will, and gave the estate to his wife and children. Decreed, the estate to go according to the will; the court conceiving the will sufficient to bar the entail of a trust.

H. 1706, cor. Cowper, C. S.
Orway Widow v. Hudson & al.
2 Vern. 583. 2 Ch. Ca. 174.

1 Eq. Abr. 120. pl. 13.
Copyholds cannot be entailed within the statute *de donis*; but they may by common law, and then surrenders or plaints in nature of fines and recoveries may bar them as well in the court baron as at common law, if the custom has been such, which is the rule in those cases, Cary, 30.

The statute 14 Geo. 2 c. 20. as to life estates, does not extend to copyholds. *Vide Withers v. Withers*, Amb. 152.

Where there is no particular method in the lord's court to bar intails, a common surrender is sufficient, though the entail is of a legal estate.

Vide White v. Thornborough, 2 Vern. 705. Prec. in Ch. 425. Gilb. Eq. Rep. 107. Moore v. Moore, Amb. 179.

4. If a copyholder sues in the lord's court, and a wrong judgment is given, equity will correct the proceedings though no appeal or error lies. *Dict. per Parker, C. J.*

M. 1716, cor. the King in Council.
Christian v. Corren, 1 P. Wms. 330.

5. *A* a copyholder in tail, accepted from the lord of the manor a grant of the freehold of the copyhold to him in fee. On a bill by a bond-creditor, for satisfaction out of the obligor's assets, a question arose, Whether the premises were assets by descent, and liable to the bond? Lord Chancellor delivered his opinion *seriatim*—That unless it be expressly found that the custom of the manor allows of entails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee; but supposing the custom of the manor *does* warrant entails, yet the copyhold is extinguished, because, in the eye of the law, that is but an estate at will, and must be merged by the grant of the freehold. The premises by such grant are severed from the manor, consequently the custom of the manor cannot corroborate the legal estate at will. The copyholder cannot hold of himself, and the copyhold, though entailed, is swallowed up (a) in the greater estate of the freehold; and as the tenant, after such time as he took the grant, did not himself continue a copyholder; so his son, on the descent of the freehold, is likewise no copyholder, which may be said from son to son *ad infinitum*. Moreover, if the entail of the copyhold be not extinguished, it will be a *perpetuity*, since the only proper

T. 1724, cor. Macclesfield, C.
Dunn v. Green, 3 P. Wms. 9.
2 Eq. Abr. 218. pl. 11.

(a) *Vide Parker v. Turner*, 2 Ch. Rep. 174. 1 Vern. 393. 458. where Lord Chancellor Jeffries delivered the like opinion in the like case. But the reporter says, *Quare autem*, If *A*. be a copyholder in tail, remainder to *B*. in fee, and *A*. takes a grant of the freehold from the lord to him and his heirs, and *A*. dies without issue, is not *B*., in whom

there was once a vested remainder, in fee of the copyhold premises, entitled to the same?

(a) It has been since determined, that where the custom does not prescribe any particular mode of barring the entail of a copyhold, a surrender (although only to the use of the will) will be sufficient for that purpose, without a custom. *Carr v. Singer*, 2 Vef. 608; *Moore v. Moore*, 2 Vef. 596. But a custom to bar by surrender may be concurrent with a custom to bar by recovery. *Everall v. Smalley*, 1 Wils. 26. and 2 Stra. 1197. S. C.—*Doe v. Truby*, 2 Blackb. Rep. 944. With respect to the *quarre* made in the note above, it seems that the remainder-man could have no equity against the tenant in tail (who had power to bar the remainder by one mode or other) upon the principle of *Cann v. Cann*, 1 Vern. 48c. So in *Blake v. Blake*, before the court of Exchequer, July 18, 1786, Robert Blake the elder devised a lease for three lives holden of the bishop of Bath and Wells, in trust for his son R. B. the younger, and the heirs male of his body, and in case he should die without issue, for the plaintiff (his other son) in like manner. R. B. the son surrendered the old lease and took a new lease for three lives to him and his heirs, all which was done without the concurrence of the trustees under the will. R. B. the son died without issue, having by will disposed of the said lease. The bill was filed to have the benefit of the new lease; insisting, that the surrender of the old lease, and the taking of the new one, were not sufficient to bar the limitation to the plaintiff under the father's will; and that those claiming under Robert, the son, ought to be declared trustees of the new lease for the plaintiff. But the court was of opinion that Robert, the son, being tenant in tail, equity could not have called upon him to have declared such a trust in his lifetime; and that there was no stronger equity against his representatives; and dismissed the bill.

21 July 1778, cor. Hardw. C.

Oliver v. Taylor, 1 Atk. 474.

Vide Baker v. Ware, temp. Maclesfield, C.

(b) An issue was directed to try whether the lands in question were copyhold or customary freehold, and if they were capable of being entailed, whether such entail could be barred by surrender or common recovery in the borough court, or by common recovery in C. B.? The result of the trial does not appear.

M. 1749, C. B.

George ex dem. Thornbury v. —, *Ambl.* 627.

1 Eq. Abr. 61.

(c) By custom the surrender of a feme covert with the assent of her husband is good. *Mo.* 123. cited 2 Bro. Ch. Ca. 387.

(d) The court compared this surrender to a presentation, which is revocable and fluctuating till induction.

(e) And of consequence no interest can vest in the defendant. The lord can never be considered a trustee in whom the land is to vest for the benefit of the devisee; for it appears plainly by *Poph.* 174. 4 Co. 23. and *Cro. Eliz.* 411. that whenever the fee simple, &c. of a copyhold is by surrender limited to the use of a will, the fee simple remains in the copyholder, and is not vested in the lord; therefore he cannot be considered as a trustee.

25 May 1750, C. B. in ejectment.

Car ex dem. Dagwell v. Singer, 2 Vef. 604.

Cited in *Moore v. Moore*, 2 Vef. 602.

6. A common recovery suffered in the Common Pleas will not pass copyhold lands; otherwise as to customary freeholds which pass by surrender in a borough court (b).

7. A widow seised in fee of copyhold lands, surrendered them to the use of her will: she then married; and with her husband, mortgaged the estate for a term under the lord's licence, without fine or surrender. This mortgage is bad at all events. There ought to have been either a fine or surrender; so that the same might be privately examined. The former surrender (c) was ambulatory and fluctuating, till some further legal act done to complete it (d). The marriage either made it void or suspended it: in either case its operation is prevented (e). The testatrix, as a feme covert, certainly could neither make a will or declare the uses of the surrender.

8. J. S. died 30 October 1746 without issue, seised of copyhold premises as tenant in tail, by an entail created by his father to the heirs of the body of the

the father by his wife. The father, besides J. S. left six daughters, whereof the wife of the lessor of the plaintiff was one. A custom was found in this manor for entailing copyhold lands. J. S. was admitted *habend.* to him and his heirs in tail, according to the custom, and he surrendered to such uses as he should by deed or will appoint, and by his will devised the premises in question to one of the defendants. Upon the Manor Rolls was found one single instance of a surrender to bar an estate tail; but it did not appear what enjoyment was under that surrender; no instance was found of a recovery suffered to bar estates tail. Verdict for defendant, *Willes, C. J.* only dissenting.

A surrender without a custom is no bar, *Co. Litt. 60. B.*

A surrender by tenant in tail of a copyhold makes a discontinuance, *Cro. Eliz. 484*.—In *Cro. Eliz. 143*, it is held no discontinuance without a custom.—Where there is no recovery by custom, a common surrender will bar the entail, *2 Vern. 583. 702*.—An estate-tail cannot be granted on condition not to bar it, *Co. Litt. 224. 1 Vern. 322*.—Plaints in nature of a real action may be in the lord's court, *Litt. s.c. 76*.—A recovery in the court of ancient demesne will work a discontinuance, *Dy. 373. Co. Ent. 206*.—It is a bar on the strength of *Morris's case, 1 Roll. Abr. 634*.—Agreed *per cur.* a discontinuance, *Cro. Eliz. 380*.—Where there is no recovery by custom, a common surrender will do, *2 Vern. 702*.—The will is only a declaration of the uses of the surrender, *1 Bull. 200. Co. Litt. 59. B. Cro. Jac. 199. 200*.

9. Chancery will not entertain a bill to rectify a mistake of names in a recovery suffered at a court baron, especially after a length of time and against a purchaser.

2 July 1750, cor. *Hardw. C. Bell v. Candall, Amb. 101. 1 Eq. Abr. 75.*

10. An estate was limited to trustees to the use of A. and the heirs of her body. She married B. The estate was copyhold, held of the manor of C., and by the custom it was not capable of being entailed, and no recovery could be suffered of it. The husband and wife by deed to lead the uses of a common recovery, declared that the lands should be to the use of the husband and his heirs, and afterwards suffered the recovery. A question then arose, What effect the recovery had upon these copyhold lands? Though by the customs of several manors copyhold estates cannot be entailed, yet they are capable of such limitations as may make them fee simple conditional. And the court, considering the wife in this case as tenant of a fee simple conditional, and having power to dispose of it by surrender after the condition was performed, *i. e.* after issue, and she and her husband having done all that could be done to transfer the estate to the husband, decreed the estate well transferred, and said this did not differ from the devise

15 Mar. 1754, cor. *Hardw. C. Pullen v. Lord Middleton, 9 Mod. 483.*

Vide Instances of barring entails by forfeiture and re-grant, *5 Sam. 422. 2 Keb. 127. 1 Sid. 314. Stile, 452*. But they are restrained to the manor of Wakefield.

Tenancy in tail of copyhold may be barred by common recovery without custom, *1 Roll. 506. B. 2*.—By special custom, *Mo. 637. Otherwise, Cro. Eliz. 380. 391*.

A recovery of a copyhold does not dock the remainder without custom, *Snow v. Cutler, Ra. 162. Sic. 1 Lev. 136*. An executory devise not barred by recovery according to *Pell and Brown*.

Vide Otway v. Hudson, 2 Vern. 585.

devise of a trust of a copyhold estate, which has been always held good.

28 June 1755, cor. Hardw. C.
Moore v. Moore, 2 Ves. 601, 602.
Ambl. 279.

Vide White v. Thornburgh,
2 Vern. 702.

Vide Cary, ex dem. Dagwell, v. Singer, 2 Ves. 604. and notes,
ante.

11. A surrender of a copyhold estate to the use of a will operates as a bar of the entail as well as to effectuate the will where there is no instance of barring by recovery.

To shew a customary estate tail it is necessary to shew remainders over or long enjoyment, so as to exclude a fee simple conditional.

A surrender by the general custom of copyholds ought to be presented at the next court: but by special custom it may be presented at a subsequent court.

14 July 1755, cor. Hardw. C.
Hinton v. Hinton, *Ambl.* 277.
2 Ves. 631. 633. 1 *Eq. Abr.* 70.

In this case Lord Hardwicke denied the authority of *Musgrave v. Dashwood*, 2 Vern. 45. 63. but his lordship's reasoning seemed to be against the sentiments of the bar.

(a) *Vide Taylor v. Wheeler*,
2 Vern. 564. 2 Salk. 449.

12. A copyholder for lives, where there was a customary right for the widow to enjoy for life the whole estate of which her husband died seised, articulated for the sale of his estate for a valuable consideration, but died before the surrender. The widow contended her free bench was not bound by the articles. *Per Lord Hardwicke*—Where there is an agreement for the sale of a copyhold estate the court will decree a performance, even against the assignees of a bankrupt (a), and against an heir at law: so in strong equity the widow should be bound.

T. 1780, cor. Eyre, B. abf. C.
Wynne v. Cooke,
1 Bro. Ch. Ca. 515.

13. An enfranchisement of a copyhold by one having a partial interest is for the benefit of all the remainder men as well as himself. A recovery suffered by one not in possession has therefore no operation.

SEC. 8. Of the Fine to the Lord—Of Quit-Rents and Yearly Rents reserved.

M. 1699, Canc.
Tredway v. Fotherley,
2 Vern. 367.

1 *Eq. Abr.* 110. pl. 16.

Note; The court in this case would have directed an issue (if desired) to try whether the lord was bound by the custom to renew the surrender, or to accept a second surrender; but the matter was ended by compromise.

1. **COPYHOLDER** in fee makes a conditional surrender for securing a sum of money at the end of six months. The money is not paid, and the mortgagee being willing to continue his money, they desire the lord that the old surrender may be taken up and a new one made for six months longer; but the lord insists the mortgagee should come in to be admitted, and pay a fine of two years' value. Equity will not relieve against the lord.

2. Where

§8. Of the Lord's Fine—Quit-Rents, &c.

C—O 301

2. Where a bill was brought by some few tenants of *Greystock* manor against the lord, to settle the customs as to fines upon deaths and alienations, an issue was directed at law, and the fines determined; but it was insisted upon, that there being but some of the tenants parties to the bill, the rest would not be bound by this trial. But Wright, C. S. held that they would all be bound.

M. 1701, cor. Wright, C. S.
Brown v. Howard,
1 Eq. Abr. 163. pl. 4.

3. A manor belonging to a bishop's see was usually leased out for lives at a rent of 49*l.* 3*s.* 4*d.* One of the bishops, on renewing this lease, excepted the demesnes, which were of the value of 32*l.* 11*s.* 1*d.*; but he reserved the full ancient rent of 49*l.* 3*s.* 4*d.* This bishop, however, accepted a rent of 16*l.* 12*s.* 3*d.* being the proportion after deducting for the demesnes, in full of the whole reserved rent. This acceptance will not bind his successor, who is entitled to the full rent reserved by the lease.

27 May 1715, Dom. Proc.
Dyke Esq. & al. v. Bishop of Bath and Wells, 1 Bro. P. C. 502.

4. The heir at law of J. S. who was the last of three lives named in the grant of a copyhold estate, brought a bill against the lord of the manor, to be admitted to the estate for his own life, and the lives of two other persons whom he should nominate; alleging the custom of paying a year and half's improved rent as a fine, and insisted that he was not by law obliged to renew the copy of any tenements holden of the manor, otherwise than at his own free election and pleasure. The court of Chancery on the hearing directed an issue to try the custom; but on an appeal this order was reversed, and the bill dismissed.

17 Mar. 1726, Dom. Proc.
Duke of Grafton v. Horton,
3 Bro. P. C. 269.

5. Plaintiff's father was lord of the manor of A. of which B. held several copyholds by divers quit-rents, and had been admitted to the same. B. dying, these copyholds descended to defendant the countess, as his daughter and heiress; upon this C. as agent to defendant Lord S., wrote a letter to D. the agent of plaintiff's father, desiring that plaintiff's father would admit the countess to these copyholds. He accordingly did admit the countess (by D. her attorney) as tenant to the copyhold premises, for which several fines were set, amounting to 40*l.* Some time after the lord of the manor died, leaving plaintiff his son and heir, executor, who brought a bill against defend-
ants

M. 1732, cor. King, C.
North v. Earl and Countess of
Strafford, 3 P. Wms. 151.
2 Eq. Abr. 80. pl. 7.

ants to recover the fine set upon the admittance, and likewise for all arrears of the quit-rents, and further charging that the lands out of which the quit-rents issued were by length of time and unity of possession obscured as to the boundaries, but that defendants could manifest the boundaries. Defendant Lord S. by answer, denied that he gave any authority to C. his agent, or to D. that his countess should be admitted by D. as her attorney. Defendants demurred as to that part of the bill which sought payment of the quit-rent or relief touching the same, for that plaintiff's remedy was at law on the statute of H. 8. Defendants also demurred to the plaintiff's relief with respect to the payment of the fine. Lord Chancellor allowed the demurrer, (notwithstanding the objections made) though he had not before known a demurrer as to the relief in such case: so that the plaintiff by the allowance of the demurrer became at liberty to except to any part of the bill which the defendant had not answered, or he might amend the bill and compel the defendant Lord S. to discover his lady's admittance. His lordship said, that plaintiff might proceed and make proclamations to oblige defendant's lady to come in and be admitted, and that he had a better remedy at law for his fine (and arrears of quit-rent) than equity could give him, for he might distrain or bring debt for the arrears of the quit-rent (a). And as to the fine, if the countess had been admitted, plaintiff might bring debt or an *indeb. assumpsit* for it, if it was a reasonable fine; and if she had not been admitted, plaintiff might, after three proclamations, seize the copyhold as forfeited upon default; wherefore Lord Chancellor allowed the demurrer as being to relief only.

(a) *Vide Holder v. Chambury*,
3 P. Wms. 256.

Reporter's Note—With respect to the copyhold fine, plaintiff might bring his action at law for it, and need not (*ut semel*) in his declaration set forth the particulars of the land held of him by defendants by copy of court roll; only, that defendant's wife held certain lands within the manor, &c. But as to the quit-rents, it seems plaintiff must, either in his action or avowry, shew the particular lands; and in case defendants in their answer set forth that they do not know where these lands lie, or what they are, plaintiff is entitled to a commission to set them out; and then the plaintiff being entitled to *this* relief, *quare*, Whether defendants demurrer to all relief be good?*

* *Vide Cox v. Foley*, 1 Vern. 359. *Duke of Bridgewater v. Edwards*, 4 Bro. P. C. 139. *Benson v. Baldwyn*, 1 Atk. 598. *Duke of Leeds v. Powell*, 1 Vef. 171. *Duke of Leeds v. Corporation of New Radnor*, 2 Bro. Ch. Ca. 318. 518.

M. 1732, cor. Kipg, C.
Crauer v. Clerk, 3 P. Wms. 157.
2 Eq. Abr. 163. pl. 22.
229. pl. 14.

6. A single copyholder is not relievable in equity for an excessive fine, (that being determinable by a jury); but, to avoid a multiplicity of suits, several copy-

copyholders may join to be relieved against a general fine that is excessive.

See *Robertson, Bunb.* 41. *Baker v. Rogers*, Sel. Ca. in Ch. 74. *Mayor of York v. Pilkington*, 1 Atk. 282. *Bouvie and Prentice*, 1 Bro. Ch. Rep. 200.

Vide Middleton and Jackson, 1 Ch. Rep. 33. *Popham and Lancaster*, 1 Ch. Rep. 96. *Dis-*

7. Where by great length of time it is become impossible to know out of what particular lands ancient quit-rents are issuable, courts of equity have exercised a jurisdiction; and have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents and payment of the same for the future.

27 Feb. 1733, Dom. Proc. *Duke of Bridgewater v. Edwards*, Bart. 4 Bro. P. C. 139.

8. Though a bill in equity lies to recover a small quit-rent, yet it ought to appear that the plaintiff has no remedy for the same at law.

P. 1734, cor. Talbot, C. *Holder v. Chambray*, 3 P. Wms. 256.

A bill for a quit-rent in some cases may be proper, as where the lands out of which the rent is claimed are wholly uncertain (a), and where the days on which the same is payable are also uncertain; but then these things ought to be laid in the bill, otherwise a lord may be vexatious to a tenant, and make him spend in his own necessary defence, more than the value of the rent.

(a) *Vide North v. Earl of Strafford*, 3 P. Wms. 148. *Duke of Bridgewater v. Edwards*, 4 Bro. P. C. 139. *Bouvie v. Prentice*, 1 Bro. Ch. Rep. 200. *Duke of Leeds v. Powell*, 1 Ves. 171. *Duke of Leeds v. New Radnor Corporation*, 2 Bro. Ch. Ca. 338. 518.

9. In a dispute between the lord of a manor and his tenants as to a custom, deeds between the lords and tenants of neighbouring manors are admissible evidence to explain and support the custom.

24 Ap. 1735, Dom. Proc. *Lowther Esq. v. Raw & al.* 4 Bro. P. C. 204.

By the custom of several manors in the counties of *Cumberland* and *Westmoreland*, a general fine becomes payable upon the death of the lord. This is a good custom, even where the manor has been alienated by the lord in his lifetime.

10. Defendant and others were tenants to the plaintiff, who claimed a fine upon the death of the late duchess, as tenant for life by settlement; but the tenants denying his right, he brought his bill to establish it. Defendants insisted he was not entitled to a fine as next admitting lord, and they brought a cross bill to establish their rights. Lord Chancellor directed an issue upon the plaintiff's title, which was found for him (b). Upon the equity reserved the court established the duke's right to a general fine, and decreed the tenants to pay the fines assessed and the costs, reserving to them liberty to try the reasonableness of the fine at the peril of forfeiture.

M. 1735, cor. King, C. *Duke of Somerset v. France & al.* 1 Stra. 654. *Fortesc.* 41. 2 Eq. Abr. 229. c. 15. 6 Vin. Abr. 109. pl. 5. *nomine Duke of Somerset v. Freame.*

(b) For a report of this trial at law, see *Strange* 658, 659. In relation to evidence three points then came before the court.—1st, Whether the lords of other customary manors should be allowed as witnesses? Held they should not.—2d, Whether evidence that other tenants had submitted and paid the fine should be allowed? held that it should.—3d, and most materially, Whether several instances of fines being paid in like cases to lords of other manors should be given

given in evidence?—Lord Raymond, C. J. and Reynolds, J. were of opinion (*Fortescue* dissenting) that the custom of one manor should not be given in evidence to explain the custom of another (1); and in this opinion the justices in C. B. and the Barons of the Exchequer (upon being consulted) concurred (2); but the case of *Chapman v. Atkinson*, 3 Keb. 90. being urged as a plain and strong authority to the contrary, and the Bar having affirmed that the contrary was the practice on the Northern Circuit (3), Lord Raymond, and Reynolds, J. submitted against their will, and the jury found a verdict for the Duke of Somerset.

(1) *Vide* Dean and Chapter of Ely v. Warren, 2 Atk. 139. S. P. per Lord Hardwicke. Noble v. Kennoway, Dougl. 49 c. per Buller, J.

(2) The point here decided in B. R. was confirmed in *Lowther v. Raw*, in Dom. Proc. Fortesc. 44. Dean and Chapter of Ely v. Warren, ante, and in *Furneaux v. Hutchins*, Cowp. 807. in which it is laid down, that proof of a custom in other parishes is no evidence to affect the parish in question, unless the custom is laid as a general custom of the country. 2 Stra. 957.

(3) The manor in question is in the North of England, viz. at *Cockermouth* in Cumberland.

In Fortescue's report of the principal case, it is said to have been agreed, that a custom that every copyholder shall, upon the change of every lord, pay a fine, is a void custom; but that where the lord is only tenant for life or by the curtesy, such custom is good.

21 May 1739, cor. Hardw. C.
Lord Abergavenny v. Thomas,
MS. case printed in 3 Anstr.
668, 9. (n.)

1 Eq. Abr. 120. (n.) to pl. 15.

11. Plaintiff as lord of the manor of C. brought a bill for a discovery of what lands in defendant's holding were copyhold and what freehold, and to have a commission to distinguish them, and that he might be let into possession of the copyhold which were held by defendant's father under a copy for three lives, all of which had dropped. Defendant insisted that by the custom of the manor the heir was entitled to have a new copy for three lives and so on for ever, paying to the lord a reasonable fine. Upon the hearing no evidence appeared of such a custom; and if there had, Lord Chancellor said it would have been void. There may be a custom for the heir of a copyholder to have a new copy, paying a fine certain, but not upon payment of a reasonable fine. His lordship said that originally all copyholds were only estates at will, but that in favor of copyhold estates the law by length of time and by custom had established their tenures, and had not put them under the will of the lord, so long as they kept the custom of the manor; and therefore in the case of copyholders of inheritance, if the custom had not settled any certain fine, the law interposed and prevented the lord from taking more than two years' value: but this was applicable only to copyholds of inheritance; for copyholds grantable for lives only, where the fine was not certain, were like leases of freehold lands for lives, and renewable only upon the best terms the party could make. In the Duke of Grafton's case (a) Lord King directed an issue to try the custom in such a case; but the Lords reversed the decree, because a copyholder might at any time set up a custom of renewal on payment of a reasonable fine not exceeding

(a) *Vide* Duke of Grafton v. Horton, 3 Bro. P. C. 269.
Wharton v. King, 3 Anstr. 659.

exceeding the greatest that ever was taken, though each particular fine had been settled by agreement. In the principal case it was proved that there had been a proclamation in the lords court for the heir to come in and renew, or shew cause why the lord should not enter upon the estate as his own. *Sed Per Lord Chancellor*—That is no proof of a tenant's right of renewal, it was done only in order to prefer the heir before any other, in case he will agree for the renewal, and the person who had been steward above twenty years had sworn that he never knew any tenant insist on such a right before.

12. An assignee under a commission of bankruptcy must surrender a copyhold to the purchaser, notwithstanding the lord may exact two fines; for no person can make a common law conveyance of a copyhold.

3 July 1746, cor. Hardw. C.
Drury v. Man, 1 *Aik.* 95, 96.

An assignee (under a commission of bankruptcy) is a vendee of a copyhold estate within the statute of 13 *Eliz. c. 7.* and not the purchaser from the assignee of such estate.

Commissioners ought to except copyholds out of a deed of assignment of the bankrupt's estate, because it will save the expence of two fines to the lord, as they may convey to the purchaser thereof in the first instance by bargain and sale.

No prejudice will accrue to creditors by leaving out copyhold estates in a temporary assignment, for an extent of the crown will not affect them.

Lord Chancellor said, there were many things in the bankrupt laws which wanted reformation, and when the legislature should be applied to, it would be proper to remedy this inconvenience with regard to copyholds.

13. Quit-rents pass to the grantee by the word *manor*, as well as all seignories, rights, and casualties, though there be no demesnes. Where from the confusion of boundaries there is no remedy by distress for a quit-rent, equity will relieve.

7 Dec. 1743, cor. Hardw. C.
Duke of Leeds v. Powell,
1 *Vesj.* 172.

14. The lord of a manor is entitled to his fine when by the custom the tenant is obliged to be admitted. As to mortgages by conditional surrender, if the surrender be not presented, by the general custom it becomes void and a new surrender is taken; but the lord has not a fine on the mortgaged tenements; it would be unreasonable, for they are only a pledge.

15 June 1751, cor. Hardw. C.
Faucest v. Lowther, 2 *Vesj.* 301.

Fines differ in different manors, but the right is not varied thereby.

28 Mar. 1783, cor. Thurlow, C.

Bourne v. Prentice,

1 Bro. Cb. Ca. 200.

1 Eq. Abr. 75.

Vide Collet v. Jacques, 1 Ch.

Ca. 79. *Davy v. Davy,* 1 Ch.

Ca. 144. 1 Roll. Abr. 375. 378.

Finch 241. 256. *Holden v.*

Chambury, 2 P. Wms. 256. *Benson v. Baldwyn,* 1 Atk. 598.

15. A bill does not lie against several tenants of a manor for quit-rents; the party having a remedy at law, where the boundaries are certain. But if terre-tenants confound the boundaries, in order to prevent a distress, the lord is entitled to a commission to ascertain them.

10 Feb. 1796, Scacc.

Wharton v. King, 3 Anstr. 659.
to 675.

16. Defendant was lord of the manor of *M.* as lessee under the dean and chapter of *Windfor.* Plaintiff was a copyholder for two lives. Upon one life dropping he offered to renew for two additional lives, and tendered 42 l. as a fine on the renewal: this was refused. On the death of the other *cestuy que vie* plaintiff claimed to have a renewal for three lives, and tendered the same fine. An issue was directed, to try whether, by the customs of the manor, plaintiff had a right to renew, on payment of the fine tendered. On the trial of this issue, plaintiff proved enjoyment by his ancestors for a century, upon successive grants for lives. *Lord Kenyon* thought this was *prima facie* evidence of a right to have such successive renewals; and his lordship rejected as irrelevant, evidence on the part of the defendant, to shew that the fines had been fluctuating, and had sometimes exceeded two years value, which he said was contrary to law. His lordship held that nothing short of a seizure into the lord's hands, on the determination of the copyholder's life estate, could negative the evidence offered for the plaintiff; and it being admitted that 42 l. was two year's value of the estate in question, a verdict was found for the plaintiff. Upon a motion for a new trial, on the ground of a misdirection by the judge; *Macdonald, C. B.* granted a new trial, a further investigation being necessary to satisfy the conscience of the court, upon the facts which were doubted in the cause. The issue came on at the following assizes before *Thompson, B.*; plaintiff then shewed, from the entries in the court rolls, such a succession of heirs admitted as copyholders for life of the premises, that the court were satisfied of the fact of uninterrupted renewals in favour of the heir, even after all the lives were suffered to run out. Plaintiff offered evidence of the same practice in other copyholds of the manor, and that the fine, though not certain, had never exceeded two years' value; and he offered parol

parol evidence to prove reputation of a right in the heir to renew; but this the judge rejected, and rested on the cases of *Duke of Grafton v. Horton* (a), and *Lord Abergavenny v. Thomas* (b), as establishing the principle that a copyholder for lives could not set up a custom to renew, unless upon payment of a fine certain. Defendant moved again for a new trial. *Per Macdonald, C. B.*—The direction of the judge was perfectly right, the evidence offered by the plaintiff was inadmissible, as tending to prove a custom not supportable in law. The certainty of a fine is an essential term in a custom for copyholders for lives to renew. Plaintiff has contended, that the fine may be rendered definite and certain, by reference to the rule adopted with regard to copyholds of inheritance, where two years value is said to be a reasonable fine. An estate of inheritance in a copyhold implies *vi termini* a right in the heir to come in not dependent on the will of the lord. An arbitrary claim of unlimited fines is inconsistent with this right: the grant of such an estate must have therefore been accompanied with some agreement, fixing the limits of this claim of the lord. In fixing what would be a reasonable agreement, various considerations occur. By granting an estate of inheritance, the lord must be understood to have meant to confer a benefit; the fine reserved must therefore be less than the value of the admission, otherwise it would be a purchase *toties quoties*, for the full value. On the other hand the fines actually paid must be referred to some right in the lord, and shew that he did not part with the whole beneficial interest. After many struggles and fluctuations, the courts have at length fixed upon two years' value, as being the fine most nearly approaching to the agreement which the parties probably made; that, therefore, is called a reasonable fine. But there is nothing in this statement, by which copyholds for lives can be brought within the principle upon which the courts have acted with regard to copyholds of inheritance; nothing from which the law can clearly ascertain that any contract ever existed, or ought to have existed, between the parties; and as the nature of the estate does not imply any agreement to renew on fixed terms, such an agreement must be proved by other evidence. The only proof that can be

X 2

given,

(a) 3 Bro. P. C. 269.

(b) 3 Anstr. 668. (n.) 1 Eq. Abr. 120. (n.) to pl. 15.

given, is the fact of renewals having taken place according to some certain standard, i. e. upon fine certain. It wants those qualities upon which the presumption arises in copyholds of inheritance, and therefore the principle cannot be carried from the one to the other. The cases of *Duke of Grafton v. Horton*, and *Lord Abergavenny v. Thomas*, fully warrant this distinction; they are directly in point: and the court subscribed both to the reason and to the authority of those decisions. The court thought the directions of the judge at the trial were perfectly right, and discharged the rule.

SEC. 9. Of Manerial Customs; and herein of Heriot Customs.

M. 1684, cor. North, C. S.
New Elm Hospital v. Andover,
1 Vern. 266.
1 Eq. Abr. 79. pl. 1.

1. BILL by the tenants of a manor to establish their right to the profits of a fair. Lord Keeper thought the bill very proper as a bill of peace, and to prevent a multiplicity of suits; but the bill praying only special relief, viz. to be quieted in possession till the right was tried at law; and not having prayed relief in the premises, or a perpetual injunction, Lord Keeper thought the bill not proper for a decree, and directed plaintiffs to amend their bill in that particular.

H. 1686, cor. Jeffries, C.
Trinity College, Cambridge, v. Brown, 1 Vern. 441.

2. An heriot is not due upon the death of the *cessary que trust*, but of him that has the legal estate.

P. 1709, cor. Cowper, C.
Wirt v. Pemberton,
2 Eq. Abr. 279. pl. 1.

3. The lord of the manor being entitled to heriots from his freeholders, upon every alienation or death, the tenants made long leases, by which they barred the lord of his heriots; the lord preferred his bill against the tenants to establish this custom. Lord Chancellor said there did not appear to be any trust, and therefore he would not help the lord. His lordship thought the custom of heriots unreasonable, the loss a family sustains being thereby aggravated, and that equity should never interpose in such cases.

T. 1709, cor. Cowper, C.
Helley v. Helley,
2 Eq. Abr. 509. pl. 4.

4. A surrender to one and his heirs, in trust for another and his heirs, breaks the custom of a copyhold; for the trust must follow the nature of the estate.

§9. Of Manerial Customs and Heriots.

C—o 309

5. J. J., plaintiff's wife's father, being seised of a copyhold estate, and having married a city orphan, covenanted with the Chamberlain of London, to surrender his copyhold estate to the use of himself for life, remainder to his wife for life, remainder to the heirs male of the marriage, remainder to his own right heirs. The copyhold was never surrendered. J. J. had issue a son and a daughter (plaintiff's wife). A., the son, being indebted, surrendered his copyhold estate to the use of his mother for life, remainder to defendants (his creditors) for 500 years, remainder to himself in fee. A. then made his will, whereby he devised all his freehold and copyhold lands to defendants, for their better security, and made them executors; he then went to the *East Indies*, where he died, leaving a widow, but no issue. The mother being dead, plaintiff and his wife brought a bill against the defendants, to oblige them to surrender back the copyhold estate, as belonging to plaintiff's wife: Lord Harcourt decreed accordingly; whereupon defendants appealed, and now per Lord Cowper—It must be taken *prima facie*, that (a) a surrender by such a tenant in tail will bind his issue, unless a particular custom were found: there ought in this case to have been a common recovery, and that not appearing, the defendants have a good title to the copyhold estate; wherefore his lordship reversed Lord Harcourt's decree.

6. A tenant cannot, by custom, dig copper in a new discovered mine, without the licence of the lord; neither can the lord without the consent of his tenant.

7. Bill for establishing a right to tolls for carts, &c. coming into a manor, dismissed; it not appearing that the place where the toll-bars were erected was within the manor.

8. Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power over it.

9. Copyholds, held of the manor of G., being granted for lives, the tenants set up a custom of renewal, on payment of a reasonable fine, not exceeding a particular sum. Lord Chancellor King directed an issue to try such a custom; but

X 3

M. 1715, cor. Cowper, C.

White v. Thornborough,

Proc. in Ch. 425.

Gillb. Eq. Rep. 107.

2 *Eq. Abr.* 231. pl. 8.

2 *Vern.* 705.

Vernon states the case thus; J. S. on his marriage covenanted to surrender his copyhold to the use of himself for life, then to his wife for life, remainder to his heirs male by his wife, remainder to the heirs of their two bodies, remainder to his own right heirs. J. S. died before any surrender made. The son surrendered the copyhold to secure a sum of money, and died without issue.—Lord Harcourt decreed, that it being a case of articles for a valuable consideration, the settlement should be to the first, &c. son of the marriage, with remainder to the daughters, and that the daughter was entitled. *Sed per Lord Cowper*—There appearing no particular custom in this case for suffering a recovery, the surrender by the son shall bar the entail.

(a) *Vide Otway v. Hudson*, 2 *Vern.* 583. *Oliver v. Taylor*, 1 *Atk.* 474. *Moore v. Moore*, *Ambl.* 279.

H. 1717, cor. Cowper, C.

Bishop of Winchester v. Knight,

1 *P. Wms.* 406.

M. 1720, in Scacc.

Attorney General v. Ayre and others, *Bunb.* 68.

M. 1724, cor. Lds. Comrs.

Edwards v. Heather,

Sel. Ca. in Ch. 3.

2 *Eq. Abr.* 23. pl. 23.

17 Mar. 1726, Dom. Proc.

Duke of Grafton v. Horton,

3 *Bro. P. C.* 269.

Vide Abergavenny v. Thomas,

3 *Anstr.* 668-9. (n.) 1 *Eq. Abr.*

120. pl. 15. (n.) Wharton v. King, 3 Anstr. 659.

the Lords reversed the decree, because they said, that a copyholder in this way, by looking into ancient rolls, and seeing what was the greatest fine that ever was taken, might at any time set up a custom of renewal, paying a reasonable fine not exceeding such a sum, though each particular fine had been settled by agreement.

M. 1726, cor. King, C.
Hagbet v. Games,
Sel. Ca. in Ch. 62.

10. A question arising in this case, Whether a custom for the lord to make new grants of part of his manor, to hold by copy, without consent of the homage, be a good custom? Lord Chancellor sent it to law to be tried.

T. 1727, in Scacc.
Thornhaugh v. Hartshorn,
Bunb. 237.

11. Bill for suit of court to a manor and fee-farm rent, or law-day silver, at plaintiff's court-leet, dismissed as proper at law.

24 Ap. 1735, Dom. Proc.
Lowther Esq. v. Row & al.
4 Bro. P. C. 204.

12. In a dispute between the lord of a manor and his tenants, as to a custom; deeds between the lords and tenants of neighbouring manors are admissible evidence to explain and support the custom.

By the custom of several manors in *Cumberland* and *Westmoreland*, a general fine becomes payable upon the death of the lord. This is a good custom, even where the manor has been alienated by the lord in his lifetime.

M. 1735, co. King, C.
Duke of Somerset v. Francis or Frame & al. Forteje. 41.

13. A custom that every copyholder shall, upon the change of every lord, pay a fine, is a void custom; but where the lord is only tenant for life, or by courtesy, such custom is good.

12 July 1737, cor. Hardw. C.
Smith v. Baker, 1 Atk. 385.
Vide *Greenwood v. Hare*, 1 Ch. Rep. 272. *Howe v. Howe*, 1 Vern. 415. *Clarke v. Danvers*, 1 Ch. Ca. 310. *Rundle v. Rundle*, 2 Vern. 252. 264. Anon. 2 Freem. 123. *Benger v. Drew*, 1 P. Wms. 781. *Dyer v. Dyer*, 1 P. Wms. 112. & n. 1. *Withers v. Withers*, Ambl. 157.

14. A. purchased an estate, for his own and two other lives, in a manor where the custom was, that whoever purchased in it, the estate should go in succession; and then, by will, he devised all his estate, real and personal, in possession or reversion, to his wife; though the legal interest be according to the custom of the manor, yet A. having an equitable interest from being sole purchaser and advancing the money, the remaining lives shall be construed as a trust for him.

2 June 1741, cor. Hardw. C.
Diana and Chapter of Ely v. Warren, 2 Atk. 189.

15. Evidence of customs in a neighbouring manor, shall not, in general, be admitted to shew the custom of another manor, because every manor is governed by its own customs.

But

But this rule is not so universal as not to be varied in some instances; for in *mine* counties, the courts at law have admitted evidence, with regard to profits of mines, &c. out of other manors where they are similar, to explain the custom of the manor in question.

The court of Chancery will not put persons to set forth a custom with so much exactness as is requisite at law, or with so much nicety as the court of Exchequer expect.

16. A manor may be in reputation, though there are no demesnes; and all services pass to the grantee by the word *manor*, such as quit-rents, seignories, rights, and casualties, which, though they seldom happen, are to be taken into consideration where a manor is granted.

7 Dec. 1748, cor. Hardw. C.
Duke of Leeds v. Powell,
1 Ves. 172.

17. Two issues were directed in this case to try 1st, Whether by immemorial custom, the tenants of the tenant right estate within the manor of R., had not used to mortgage such estates by deed, on condition to be void if the mortgage money was paid within three years from the time of making the mortgage; and whether the mortgagees had a right to present such mortgage deeds and be admitted thereon, at the next manor court held after breach of the condition, paying a fine to the lord?

15 June 1751, cor. Hardw. C.
Fawcett v. Lowther,
2 Ves. 300. to 302.

2dly, Whether, by the custom of the manor, on such mortgage made and mortgagor's dying without issue, and without having aliened the equity of redemption by any disposition pursuant to the custom of the manor, the lord of the manor became entitled to the equity of redemption of such mortgage? and there was a direction to go to trial on the first issue only, if defendant, who claimed the redemption as collateral heir of the mortgagor, should consent to give up his claim.

In July 1750, a motion was made to vary the sense of these issues, which Lord Chancellor refused: on a rehearing objections were made to both issues.

1st, That the custom set up by the first issue, on the part of the plaintiff, was unreasonable, and not good in law, therefore ought not to be tried, being contrary to the general custom of the manor, and to an indenture of 22 *Eliz.* which laid down rules for all alienations to be presented at the next

court. That a mortgage is an alienation, though on a condition subsequent to defeat the estate, and therefore within that rule; and such indenture was intended to settle all disputes and customs of the manor. That it was unreasonable, because prejudicial to the interests of the lord, who might thereby lose his alienation fines. That it was inconvenient to the tenants, as liable to frauds; for a mortgage may be made and not be presented in three years; and in the mean time the mortgagor or tenant may have made an absolute conveyance to a vendee, who may have it presented and over-reach him.

2dly, A stronger objection, to shew the custom void, was, that it differed from most cases, both of copyhold and tenant right estates; for it was so restrained that it must descend to the issue, cannot to the collateral heir, and shall, for want of issue, escheat to the lord, unless an alienation made; whereas by this means, the lord cannot know his tenant; the mortgagor remains tenant on the records of the manor; the mortgagee for three years has a conveyance, may come at the end of three years, have it presented, and be admitted; and that, as plaintiff insists, after the death of the tenant without issue, which will prevent the lord of his escheat. As a further aggravation, this was contended to be a military tenure, and the lord must know his tenant, otherwise he cannot tell upon whom to call for services, nor make a forfeiture for want of performance. As to the last issue it was objected as improper to be tried at all. It has never been determined whether there can be an escheat of an equity of redemption, but it must be now taken that there may, and so of a trust, otherwise there would be an end of escheats.

Per Lord Chancellor—The court is not bound to send a custom to be tried which *prima facie* is void at law. This rule holds in all courts of equity (a). No authority is cited to prove that this is void at law. It is plain the indenture of 22 *Eliz.* does not comprize all the customs of the manor; and as a mortgage differs from an absolute alienation, there is nothing absurd in it, for there may be a distinct custom concerning mortgages from that of absolute alienations. As to the lord's prejudice, he is entitled to his fine when by the custom the tenant is obliged to be admitted, and in that respect

(a) In *Seacc.* if a *modus* insisted on in the answer appears clearly void at law, the court will not send it to be tried.

respect it differs not from mortgages of copyholds which are constantly done in that manner. Conditional surrenders are made, and if the surrender be not presented by the general custom, the surrender becomes void, and a new surrender is taken. The estate does not become void. The lord has not the fine on the mortgaged tenements; it would be unreasonable, for they are only a pledge. The fines of the manor in question are low. Fines differ, but that varies not the right. By the general custom of copyholds, the surrenderee must come and have it presented at the next court, but there are several copyholds where the tenant need not come under three courts (b). As to the strongest objection, that the lord's escheat will be prevented, it cannot escheat by the death of the mortgagee without issue, because he was never admitted tenant, nor by the death of the tenant without issue, for the mortgagee may come in and be admitted afterwards. A custom is not void, because it diminishes the lord's casualty or profit as to an escheat; there may be many such customs which may have a good original. Though a custom that a copyholder for life may commit waste would not be good, yet it is good for a copyholder in fee to do so. Customs are supposed to take their rise by grant or agreement. It might be a good foundation originally for an agreement between the lord and his tenants, that though the tenants are bound to present an absolute conveyance at the next court, yet as to mortgages, where the estate is only a pledge, they are not bound to present till the third court, till such conveyance is presented, and the grantee and mortgagee admitted, the grantor and mortgagor remain tenants. It is a new doctrine, as contended, that a tenant right estate is a military tenure. It is not shewn, that there are military services, for non-performance of which the tenant is to forfeit his estate. So far as appears, the mortgagor remaining tenant till the mortgage deed is presented, and admittance on it, it answers all the purposes except the *quantum* of the value of this casualty by escheat. Lord Chancellor could not be of opinion that this custom *prima facie* was void in law. It comes then to the question of fact. The books of the manor are very dark, but there is strong proof of the custom by parol, which is fit for the consideration of a jury.

(b) *Vide Co. on Copyh.*

The

The next issue is between the lord and the collateral heir of the mortgagor. There the order ought to be varied. This is not proper to be tried by a jury, being a mere equity of redemption in which the custom cannot operate. But an equity of redemption will follow the custom as to the legal estate, as in *Borough English* and in *Gavelkind*, but it is not proper to be tried, whether the law which it follows be the law of the land or *lex loci*. As to the question, whether there can be an escheat of the equity of redemption in this case, it has not been determined that there can, nor would Lord Chancellor so determine it. It was argued, that there will be soon an end of escheats, because all the lands in *England* will be in trust, yet that is contrary to the old doctrine. The question, whether there can be an escheat of a trust, has not been determined. Defrauding the lord of escheats, was one of the mischiefs recited in the statute of uses. The collateral heir cannot claim the equity of redemption, if he could not claim the legal estate. If then the lands can descend only to the lineal heir, it may be a question between the lord and the plaintiff the mortgagee, Whether the lord has a right to call on him to redeem his mortgage, on the foot of the escheat of that equity of redemption in him which originally was in his tenant? That will remain to be considered on the equity reserved after trial. The second issue must be left out, but as to the first the directions must stand, and the decree be affirmed.

Lord Chancellor said, he would not on a direction to try a general custom insert every circumstance attending each particular case, for that would entangle the general custom.

31 July 1751, cor. Hardw. C.
Lord Montagu v. Dudman,
2 *Ves.* 399.

18. Equity will not entertain a bill by a lord of a manor to discover whether this or that person is of the best ability to answer a heriot, for it would occasion infinite difficulties to copyhold estates.

28 June 1755, cor. Hardw. C.
Moore v. Moore, 2 *Ves.* 602.

19. A surrender by the general custom of copyholds is to be presented at the next court; but it may by special custom be presented at a subsequent court (a).

(a) *Vide* Co. on Copyh.

12 July 1763, cor. Henley, C.
Northleigh v. Luscombe,
1 *Eg. Abr.* 78. *Ambl.* 612.

20. Bill by the lord of a manor claiming a prescriptive right to certain tolls for goods landed, and praying a discovery of the goods landed by defendant.
Defendant

§9. Of Manerial Customs and Heriots.

C—o 315

Defendant denied plaintiff's title and refused to discover. *Per curiam*—Defendant is not compelled to discover till plaintiff has established his right at law. *Aliter* where the title is in equity.

21. A custom in a manor that copyholds shall not be surrendered to the use of a will, is bad.

T. 1791, cor. Thurlow, C.
Pyke v. White,
3 Bro. Ch. Ca. 288.

22. A custom to renew copyholds for lives can only be on payment of certain fines. A custom to renew on payment of a reasonable fine is a void custom.

H. 1796, in Scacc.
Wharton v. King, 3 Anstr. 659.
See this case more fully in last section.

Vide Duke of Grafton v. Horton, 3 Bro. P. C. 269. Lord Abergavenny v. Thomas, 3 Anstr. 668-9. (n.) 1 Eq. Abr. 120. pl. 15 (n.) S. P.

SEC. 10. Of the Acts of the Steward, and in what Cases the Lord shall be bound thereby.

1. **A**N entry in the steward's book and a parol proof by the foreman of the jury admitted as evidence that a feme covert surrendered her whole estate, though the surrender and admission upon the Roll were but of a moiety.

P. 1706, cor. Cowper, C. S.
Hill & Ux v. Wiggan,
2 Vern. 547.

2. The bare entry of a steward in his lord's contract book with his tenants, is not an evidence of itself that there is an agreement for a lease between the lord and a tenant (a).

2 Mar. 1738, cor. Hardw. C.
Charlewood v. Duke of Bedford
and others, 1 Atk. 497.

(a) In *Allan v. Bower*, 3 Bro. Ch. Ca. 149. a lessor made a verbal promise to his lessee to secure

him in possession of the premises during the lessee's life. In consequence of the promise the lessee made considerable alterations and improvements. After the lessor's death a memorandum of this promise was found among his papers, wherein he hoped the same would be observed. Lord Thurlow held, that the memorandum-book took the case out of the statute of frauds, and directed a lease to be made to the lessee for 99 years, determinable on his life.

A performance only on one side (b) is not a dispensation of the statute of frauds and perjuries, but *casus omisus* against which there is no provision.

(b) *Vide Attorney-General v. Day*, 1 Ves. 221. *Potter v. Potter*, 1 Ves. 441. *Whitchurch v. Bevis*, 2 Bro. Ch. Rep. 559.
Lacon v. Meriin, 3 Atk. 3. and Sanders' note to 3d edit.

3. *J. W.* the eldest brother of a family, being near his end, applied to *T. W.* the plaintiff and to his sister, who had solicited him to do something for them, and told them, "If you will surrender your copyhold estate (as you have no children of your marriage) for the benefit of your brother *R. W.* the defendant, I will secure an annuity of 5*l.* for your life and an annuity of 2*l.* 10*s.* for your sister." Plaintiff agreed to the terms, and promised to surrender his copyhold estate, upon which *J. W.* surrendered his copyhold estate to defendant, charged with these annuities. Defendant

11 Dec. 1740, cor. Hardw. C.
Walker v. Walker, 2 Atk. 53.
Barnard. 214.

defendant refused to pay them, unless plaintiff would surrender his own copyhold estate pursuant to his promise to *J. W.* The principal question in this case was, Whether parol evidence might be admitted to establish the fact? and it was determined that it might to rebut the equity set up by the plaintiff's bill. In the course of the cause the steward of the court, who was concerned in the transaction, was examined for the plaintiff, who swore that *at or before the time of the surrender* he never heard of the agreement insisted upon by the defendant. This is a manifest evasion, and a negative pregnant that he heard of it *after the surrender*.

6 Ap. 1744, cor. Hardw. C.
Car v. Ellison, 3 Atk. 73.

7 Feb. 1759, Dom. Proc.
Blacker v. Mathers,
5 Bro. P. C. 340.

9 July 1790, cor. Thurlow, C.
Earl of Abingdon v. Butler and another, 3 Bro. Cb. Ca. 112.

4. A steward's indorsing upon a surrender of a copyhold the uses of it is sufficient, without specifying them in the court rolls.

5. Entries of presentments in the books of a manor are not evidence of acts of ownership.

6. A tenant having by misrepresentation and collusion with the lord's steward, obtained a renewal of a lease for lives, as if *one* life only had dropt and two were to be exchanged, when in fact *two* lives had fallen; decreed to pay the value of the two lives, and he shall not have the option of delivering up the new leases and abiding by the old one.—And if the tenant cannot pay the value, the steward in such case shall pay it, and also his own costs.

SEC. II. Of the Right of Common; and herein of Disputes or Agreements between the Lord and his Tenants touching the same.

H. 1681, Canc.
Silway v. Compton, 1 Vern. 32.
1 Eq. Abr. 103. pl. 8.

M. 1681, cor. Finch, C.
Hew v. Tenants of Bromsgrove,
1 Vern. 22. 1 Eq. Abr. 79. pl. 1.
Cary. 3.

1. A COMMON that has been inclosed for 30 years shall not afterwards be thrown open.

2. Upon a motion for a new trial, after verdicts upon two issues, which were directed, one to try whether a lord of a manor had a grant of free warren; and the other, in case he had a grant, whether there was sufficient common left for the tenants? Lord Chancellor said, that those matters were properly triable at law; but it being urged that the bill was to prevent a multiplicity of suits, and

§ 11. *Of the Right of Common.*

C—o 317

and was in nature of a bill of peace, a new trial was granted, upon payment of full costs; though Lord Chancellor doubted the jurisdiction of the court in this case.

3. If a commoner brings an action against *A. B.* for oppressing the common, or using it where he ought not, and recover 1 s. or other small sum for damages, and afterwards another commoner brings the like action against *A. B.*, he may bring a bill that the plaintiff in such action may accept the like damages.

H. 1684, cor. Guildford, C. S.
Powlet v. Ingres, 1 Vern. 308.
1 Eq. Abr. 103. pl. 1.
Vide Gell v. Hayward, 1 Vern.
312.

4. A decree for confirming an agreement between the lord of a manor and his tenants, for settling heriots and stinting the common, was revived by a bill at the suit of a purchaser of the manor, (who did not come in in privity) and the decree was confirmed, though the lord and his tenants were only tenants for life. And his Honor said, that the issue in tail ought to be bound, for he would not presume that the tenant in possession would do any thing in prejudice of the tenant's right.

H. 1685, cor. M. R.
Dunn v. Allen, 1 Vern. 427.
1 Eq. Abr. 2. pl. 2.
The reporter says, *Quere* is-
men? to this determination.

5. A decree was made for an inclosure 20 years since, and the husband of a feme covert who had a right of common there agreed to such inclosure in his lifetime. Though the husband's consent could not bind the wife's interest, yet it appearing to be for the improvement of the wife's estate, and that she intended to make an unreasonable advantage to herself, the court decreed the inclosure should stand.

P. 1687, cor. Jeffries, C.
Rothwell v. Whiddington,
1 Vern. 456.
1 Eq. Abr. 103. pl. 9.

6. An agreement between the lord of a manor and his tenants for stinting a common shall be performed, though opposed by one or two humour-
some tenants, for such an agreement is more
favoured in equity than an agreement to inclose a
common.

T. 1689, cor. Lds. Comrs.
Delabre v. Beddingfield,
2 Vern. 103.
1 Eq. Abr. 24. pl. 3. 104. pl. 6.

7. A man having granted to *J. S.* common in his down for 100 sheep and five rams, the grantee brought a bill against the grantor, for that he had over-stocked the common, so that the grantee could have no benefit from his grant, where-
fore he prayed that the grantor might be enjoined
from so doing; but the court dismissed the bill (a).

M. 1689, cor. Lds. Comrs.
Fines v. Cobb, 2 Vern. 116.
1 Eq. Abr. 103. pl. 3.

(a) A commoner or any other
person may have an action if the
lord surcharges the common. F. N. B. 125. 9 Co. 112. S. P.

M. 1693, Canc.
Weekes v. Slake, 2 Vern. 302.
 1 Eq. Abr. 103. pl. 4.
 H. 1697.
Arthington v. Farwokes & al.
 2 Vern. 356.
 1 Eq. Abr. 103. pl. 4.

H. 1706, cor. Cowper, C. S.
Brudges & al. v. Curwen, & al.
 2 Vern. 575.

P. 1716, cor. King, C. and
 Jekyll, M. R.
 — v. *Palmer & al.*
 2 Eq. Abr. 207. pl. 4.
 3 Vin. Abr. 8. pl. 33.

* These words are not in the original.

(a) For that the lord of common right was entitled to the soil of the waste, and the tenants had only a right to take the herbage by the mouth of their cattle; and by the statute of *Merton* the lord might inclose part of the waste, leaving sufficient common—That in common law, in an action brought against the lord, the tenant must allege in the declaration that there is not sufficient common left, or he cannot maintain the action; and if that should be the present case, (though no such matter is made out by the affidavit,) the tenants may have their remedy at law. That the lord has a right to open mines in the waste of the manor, and why not? to dig brick earth, especially in the present case, where the bricks are made for a tenant of the manor, and to be employed in building upon the manor.—As to the inclosure, his Honor said it was too soon for an injunction before answer. Ibid.

7 Mar. 1717, cor. Cowper, C.
Ward v. Reily,
 2 Eq. Abr. 631. pl. 3.
 16 Vin. Abr. 253. in a note to
 pl. 46.

This does not appear correctly stated; vide 1 Bro. P. C. 578. where it is said that the respondent paying the appellant's costs should be at liberty to bring the cause again to a hearing against Lord Fingal, to whom they had attorned. It does not appear that the bill was dismissed.

H. 1719, in Scacc.
Lady Granville & al. v. Ramsden & al. Bunb. 56.

Note; Matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review. 2 Eq. Abr. 176. pl. 14. (n.)

27 Jan. 1720, Dom. Proc.
Lady Lansborough v. Ockshot,
 2 Bro. P. C. 116.
 5 Vin. Abr. 8. c. 31.
 2 Eq. Abr. 207. c. 2.

8. In both these cases the lord of a manor inclosed a part of the common, insisting it was an improvement within the statute of *Merton*. The court, however, continued the injunctions, and directed issues to try whether sufficient common was left for the tenants.

9. The greatest part of the landholders entitled to right of common agree to a stint of the common. Held that this will not bind the rest.

10. Bills brought by plaintiffs as tenants of a manor, to establish their right of common, of pasture, and turbary in the waste of the said manor, and for injunction against defendant, lessee of the manor for years under the crown, to stay his digging of brick earth, and making brick, and inclosing part of the common, &c. The motion upon the bill filed, and affidavits of making brick and inclosing part of the common (was for an injunction)* till answer and further order. Motion refused (a).

11. A bill was dismissed because the tenants were only parties, and not the lord, they having attorned to a new title against their first lessor.

12. A bill was brought to establish plaintiff's right of common, and to set aside several former decrees. Defendant demurred to the whole bill; for if there was any error in the former decrees, there should have been a bill of review. Demurrer allowed.

13. The lord of a manor entered into an agreement with his copyhold tenants for inclosing part of a common, and, to effectuate this agreement, the tenants consented to the inclosure, and released their right of common in the ground to be inclosed; and the lord, on the other hand, released each particular

particular tenant from all quit-rent and other services. The inclosure, by various accidents, was prevented from taking effect, and therefore the tenants continued to enjoy their right of common, pay their quit-rents, and do suit and service at the lord's courts, as before. Held, that this agreement was mutually waived.

14. The several owners of lands in the parish of C. enter into an agreement, that a particular common should be enjoyed as cow pasture for 99 years, and this agreement is signed by the bailiff of one of the owners, *so far as he had power*, though no particular authority could be shewn, yet after an acquiescence of above 30 years; on the part of this owner an authority shall be presumed, and he shall be bound by the act of his servant.

15. A bill was brought to quiet possession of a right of common in the manor of M. and to prevent distresses. An answer and demurrer were put in, and then plaintiffs amended their bill and obtained an injunction till answer and further order. Defendants moved to dissolve, producing affidavits of 50 years quiet possession and right of commonage: yet the court refused to interpose till one or more verdicts at law, and dissolved the injunction.

16. Bill for tithes, glebe, and right of common. It appearing that the two latter points were proper at law, the court retained the bill until plaintiff had by action ascertained his title, and in the meantime would not decree the tithes.

17. A bill brought by one tenant of a manor, suggesting a custom for the tenants of the manor of A. (of which he was one) to cut turfs in the manor of B. To quiet him and to have an issue directed as to the right, was the end of the bill. *Per curiam*—This bill is improper, and inconsistent with the nature and end of such bills, which is, that where several persons having one and the same right, in which they are disturbed on application to the court, to prevent expence and multiplicity of suits (which each of them are entitled to on their several rights) issues will be directed, and one or two determinations will establish the right of all parties concerned on the foot of one common interest; but in all those bills, either all parties join, or a determinate number, in the name of themselves and the rest, prefer

17 Mar. 1720, Dom. Proc.
Tuiston v. Wentworth alias Creswell and others,
2 Bro. P. C. 243.
5 Vin. Abr. 8. c. 32.
15 Vin. Abr. 314. c. 10.
2 Eq. Abr. 207. c. 3.

H. 1726, cor. King, C.
Anon. Gilb. Eq. Rep. 183.
2 Eq. Abr. 172. pl. 3.
207. pl. 1.

T. 1727, in Scacc.
Sweetapple v. Duke of Kingston,
Bunb. 238.
Vide *Chamberlain v. Spenser*
and another, 4 Nov. 1731.

T. 1729, cor. King, C.
Baker v. Rogers,
Sel. Ca. in Ch. 74; 75.
2 Eq. Abr. 172. pl. 4.

Attorney-General admitted the rule; but said the plaintiff was the only person interrupted, and therefore the others cannot be made plaintiffs; and to make them defendants would be only bringing them into court to pay their costs. But *per* Ld. Chancellor—This is not suggested in the bill.

prefer a bill; but in this case one only brings a bill *on the general right*, and *not on the foot of any particular distinct right*. Bill dismissed with costs.

P. 1734, cor. Talbot, C.
Holder v. Chambury,
3 P. Wms. 257.
2 Eq. Abr. 163. pl. 25.

18. Lord of a manor cannot bring a bill against a tenant, to the end that he may hold a down belonging to the manor discharged of the tenants right of common therein. In the present case the lord's bill for such purpose was dismissed with costs. For the same reason, Lord Chancellor said, the lord may bring a separate bill against every tenant of the manor in question who shall set up the like claim (a).

(a) *Vide* Disney v. Robertson, Bunb. 41. Mayor of Boston v. Jackson, Bunb. 101. Mayor of York v. Pilkington, 1 Atk. 282. Lord Teynham v. Herbert, 2 Atk. 483. Bouwrie v. Prentice, 1 Bro. Ch. Rep. 200.

16 Nov. 1738, cor. Hardw. C.
Congers, and others v. Lord Aber-
gavenny and others,
1 Atk. 285.

19. A bill of peace, praying an injunction to stay the defendants, who have an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiff for building houses on the manor without leave; and that they may accept of such a compensation as the court shall think reasonable. The court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority, but act in a judicial capacity only.

A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

2 June 1741, cor. Hardw. C.
Dean and Chapter of Ely v. War-
ren, 2 Atk. 189.

20. Fenny lands being frequently buried under water for seven or eight years, and producing no profit at all to the copyholder, he may by way of compensation, when the water is drained and the land improved from the additional soil brought by the floods, be entitled to common of turbary, and to dig up the soil of the lord of the manor for turf.

An occupant being only a tenant at will, can never have a right to a common of turbary, or to take away the soil of the lord, though a tenant is entitled to as much turf as may be sufficient for the house to which the common is appendant.

22 Feb. 1742, cor. Hardw. C.
Poore v. Clark, 1 Atk. 516.

21. A decree against the lord of the manor will not bind copyholders in fee, or freeholders for life, who were no parties to it.

5 Dec. 1758, Dom. Proc.
Lord Irwin v. Simpson & al.
5 Bro. P. C. 326.

22. Where the lord of a manor by feoffment grants certain parcels of common or waste lands to trustees, for the benefit of themselves, and the rest of the tenants of the manor; the whole of the lord's interest passes, and there is no resulting trust for him, as to the ownership of the soil.

SEC. 12. Cases of contested Rights between the Lords of neighbouring Manors.

1. THE lord of the manor of *A.* brought a bill for a rent of 8*s.* payable out of a copyhold held of the manor of *B.*, and though it appeared by the court rolls of the manor of *B.* from *Hen. 8.* down to *Car. 1.* that the copyhold was held of the manor of *B.* at the rent of 8*s.*, and though it was admitted by the plaintiff that the copyhold was held of the manor of *B.*, and that he had no other evidence of his title to the rent, but that it had been paid him near 20 years, yet the court decreed him the arrears and growing rent, and denied the defendant a trial at law. Lord Keeper said, it was agreeable to the rules of law, where in cases of *incroachment* of rent if the tenant makes but one payment of more than was due, he shall never go back from it; and after a payment of 20 years, a grant of the freehold of the copyhold of the manor of *B.* shall be presumed.

M. 1705, cor. Cowper, C. S.
Steward v. Bridger,
2 Vern. 516.

2. Where any dispute arises from a confusion in the boundaries of a copyhold estate, a commission of inquiry ought to be directed, with a previous inspection of all deeds and writings.

23 Mar. 1725, Dorn. Proc.
Rous Bart. v. Barker & al.
3 Bro. P. C. 180.
Note; A commission did issue, and the return of it appears in Bunb. 251. which return was afterwards quashed for uncertainty. No farther proceedings appear.

3. A bill in equity lies to have a trial at law for the bounds of a manor.

27 Oct. 1726, Cane.
Letbulier v. Castleman,
Sel. Ca. in Ch. 60. 2 Eq. Abr. 151. pl. 12.

Vide Hughes v. Games, Sel. Ca. in Ch. 61.

Note; On such bill each party must give a note of the bounds he intends to claim, and if the jury find bounds different from the notes given, those different boundaries must be indorsed on the *possession*. *Vide Bishop of Durham's case*—In the present case they were indorsed on the *Ha. Car.* it being a trial at law.

4. On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, in order to have the matter tried in a feigned issue (a); and the issue being found for the defendant on three trials, he was not only allowed the costs of all the trials at law, but also those in equity; in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity.

M. 1726, cor. M. R.
Metcalfe v. Beckwith,
2 P. Wms. 376.
2 Eq. Abr. 240. pl. 19.
(a) In *St. Luke's v. St. Leonards*, 1 Bro. Ch. Rep. 70. Lord Thurlow thought a bill to settle the boundaries of a *parish* would not lie, it being merely a question at law. 1.

On a bill of partition, no costs are allowed on either side, because it is for the benefit of both parties.

M. 1726, cor. King, C.
Hughes v. Games,
 Sel. Ca. in Ch. 62.
 2 Eq. Abr. 228. pl. 12.

5. In this case it was admitted, that a lord of a manor by *custom* may make new grants of part of the manor to hold by copy, and a case was cited to that purpose; but Lord Chancellor King said, that in the case cited such grants were made with *consent of the homage*. The question here is, Whether there be a *custom* to do it *without the homage*? and that must go to law, and then it will be by them considered how far a *custom* to make such grants *without the homage* be a good custom.

P. 1739, Canc.
 Sir John Webb v. Banks,
 2 Eq. Abr. 164. pl. 30.

6. A bill *lies not to ascertain the bounds* of a manor *in part*, unless plaintiff establish by proof what shares he claims.

17 Dec. 1742, cor. Hardw. C.
 Lord Tenham v. Herbert,
 2 Atk. 484.

Agreeable to this distinction are the following cases; *Whitchurch v. Hyde*, 2 Atk. 391. *Wilby v. Duke of Rutland*, 6 Bro. P. C. 575. *St. Luke v. St. Leonard*, 1 Bro. Ch. Ca. 40. *Willer v. Smeaton*, 1 Bro. Ch. Ca. 572.

7. Where a dispute exists between two lords of manors about a right of fishery, neither of them can go into equity till the right is first tried at law.

3 July, 1755, cor. Hardw. C.
 Anon. 2 Ves. 621.

8. The rule of discovery in equity by answer (unless subjecting to a penalty) depends not on the rule of law. Equity will grant a discovery on a dispute between the lord of one manor and the lord of another.

10 Feb. 1794, Sessc.
Atkins Clerk v. Hatton Bart. & al.
 2 Anstr. 386.

9. A commission to settle the boundaries of a manor or of a parish ought not to be granted by a court of equity, where the interests of all parties who may probably be concerned are not before the court (a).

(a) A commission is a proceeding so contrary to the spirit of the common law that it ought never to issue unless upon weighty grounds. Rep. temp. Finch, 17—239. *Metcalfe v. Beckwith*, 2 P. Wms. 376. Rep. temp. King, 60, 61. *St. Luke's v. St. Leonard*, 1 Bro. Ch. Ca. 41. *Webb and Conyers*, there cited. *Bishop of Ely v. Konrick*, Bunb. 322. — In *Webb v. Conyers*, Lord Northington refused a commission to settle the boundaries of a manor; and in *Winterton v. Lord Egremont*, Lord Thurlow refused to entertain jurisdiction upon an amicable bill to settle boundaries. So in *Rouse v. Barker*, 3 Bro. P. C. 180. the court refused to ascertain the boundaries of freeholds and copyholds in a manor; but the Lords reversed the decree, and a commission issued.

A terrier cannot be received in evidence unless it comes from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found (b).

(b) *Vide Miller v. Foster and another*, 2 Anstr. 387. (n.)

SEC. 13. Of Estates *pur autre Vie* in Copyhold Lands, and how far *Cestui que Vie* shall be considered a Trustee for the first Taker.

1. A Copyhold estate granted to *A.* for lives of *A., B., and C.* *A.* died intestate—his administrator shall have the estate during the lives of *B. and C.,* as having the title of the first taker who paid the fine; the other lives being only in nature of trustees.

Nota; It was pressed in argument for the defendant in this case, that there was not any custom in the manor of which the estate was held that the first taker might surrender, nor is there any such custom where the copies run *successive*.

2. *A. R.* purchased a copyhold estate for his own life and the lives of his son and niece. *A. R.* and his son being both dead, plaintiff, as the widow and administratrix of the son, brought her bill against the niece, setting forth the custom, and that the name of the niece was made use of as a trustee for *A. R.* who had paid the fine, and prayed that the same might be decreed a trust. But there being no custom within the manor, where the copy is to three for their lives *successive*, that the first taker may surrender the copy, the court would not decree the remaining life to be a trust for the first taker and to go to his executor or administrator, as had been done in cases where there was such custom (*a*). Decreed, therefore, to go in succession; and the court said, that if it had been a trust, the administratrix should have had the benefit of it as an estate *pur autre vie*.

3. Where a copyholder purchases a copyhold for three lives, and puts in his own life, with two others, to hold successively according to the custom of the manor. If the first taker paid the whole money, the others are only trustees for him, and he may in equity dispose of the estate, though it be in a manor where there is no custom for the first taker to dispose. Unless the other two lives were put in pursuant to some agreement.

4. A copyhold was granted to the husband and wife and *J. S.* for their lives *successive*: the fine appeared by the Rolls to be paid by the husband and wife only. *J. S.* was decreed a trustee for the husband and wife and the survivor.

M. 1686, cor. Jeffries, C. Howe and others v. Howe & al. 1 Vern. 415.

Vide Clark and Danvers, 1 Ch. Rep. 310. Powell and Thealwell, Thyne and Bamfield, which were cited as precedents of the like decrees.

P. 1692, Cane.

Rundle v Rundle,

2 Vern. 252. 265.

1 Eq. Abr. 119. pl. 9.

Vide 1 Ch. Ca. 310.

Note; There can be no occupant of a copyhold estate *pur autre vie* for the prejudice it would do to the lord; for upon the death of the tenant the lord shall enter immediately. *Vide Smartley v. Penhallow, 1 Salk. 188.*

(*a*) *Vide Howe v. Howe, 1 Vern. 415. and the cases there referred to.*

P. 1692, cor. Lds. Comrs.

Accon. 2 Freem. 123.

2 Eq. Abr. 226. pl. 4.

H. 1721, cor. Macclesfield, C. Bengier v. Drew, 1 P. Wms. 781.

2 Eq. Abr. 227. pl. 8.

739. pl. 5.

Vide Withers v. Withers, Ambli. 151.

17 May 1726, Dom. Proc.

Duke of Grafton v. Horton,

3 Bro. P.C. 269.

Vide Abergavenny v. Thomas,
3 Anstr. 668, 9. (n.) 1 Eq. Abr.
120. pl. 15. (n.) *Wharton v.*
King, 3 Anstr. 659. & ante, f. 8.
where it is said that a custom to
renew for lives on payment of a
reasonable fine is void; but there
may be a custom for the heir of
a copyholder to have a new copy
on payment of a fine certain. See
also in that case the distinction
(with regard to fines) between copyholds of inheritance and copyholds for lives, and the definition of a
reasonable fine.

22 July 1737, cor. Hardw. C.

Smith v. Baker, 1 Atk. 385.

5. The heir at law of *J. S.*, who was the last of three lives named in the grant of a copyhold estate, brought a bill against the lord of the manor to be admitted to the estate for his own life and the lives of two others, whom he should name, alleging a custom of paying 18 months' improved rent as a fine, and insisting that he was not obliged to renew the copy of any tenant but at his own election. The court of Chancery directed an issue to try the custom; but the Lords reversed the order, and the bill was dismissed.

6. *A.* buys a copyhold estate for his own and two lives in the manor of *M.*, where the custom was, that whoever purchases in it the estate should go in succession; and by his will devises all his estate real and personal, in possession or reversion, to his wife. Though the legal interest be according to the custom of the manor, yet *A.* has an equitable interest from being the sole purchaser; and it shall be construed as a trust for him, he having advanced the money (*a*).

(*a*) *Vide Greenwood v. Hare,*
1 Ch. Rep. 272. *Howe v. Howe,*

1 Vern. 415. *Clarke v. Danvers,* 1 Ch. Ca. 370.

Rundle v. Rundle, 2 Vern. 252. 264. Anon.

Freem. 123. Benger v. Drew, 1 P. Wms. 781.

Dyer v. Dyer, 1 P. Wms. 112. and n. 1. *Withers v. Withers,* Amb. 157.

Where a man devises all his estate real and personal to a wife or child, and has no other real estate but a copyhold, it shall pass by those general words (*b*); but this depends on the circumstances of the case.

(*b*) Note; Where there is a surrender to the use of the will, or where the devise operates upon the equitable interest, the general words mentioned in the principal case will always pass copyhold lands. *Scott v. Alberry,* Com. Rep. 337. 9 Mod. 72. 75. *Tendril v. Smith,* 2 Atk. 85. *Car v. Ellison,* 3 Atk. 71. But where there is no surrender to the use of the will, then comes the question, Whether equity will supply the want of a surrender in favour of the devisee; for as law they certainly do not pass by the general devise? *Vide Hawkins v. Leigh,* 1 Atk. 388. *Milbourn v. Milbourn,* 2 Bro. Ch. Ca. 64. *Trod v. Downs,* 2 Atk. 304.

11 Nov. 1751, cor. Hardw. C.

Withers v. Withers, Amb. 151.

1 Eq. Abr. 120. pl. 10.

Lord Hardwicke in this case gave an obiter opinion, that the statute of 14 Geo. 2. c. 20. as to life estates, does not extend to copyholds.

(*c*) *Vide 29 Car. 2. c. 3. f. 8.*

(*d*) *Howe v. Howe,* 1 Vern.

415.

7. It was the custom of the manor to grant copyholds for three lives *successive sicut nominantur*. *P.* being the last life in an old copy was advised to renew, and accordingly he named *H.* and *B.* two young persons. A copy was granted to hold to them *successive*, for which *P.* paid the fine. On the death of *P.* a question arose, Whether *H.* being the next in nomination, was entitled? or whether the copyhold went to the representative of *P.*? *Per curiam*—Resulting trusts of copyholds as well as of freeholds are within the statute of frauds (*c*). The representative of *P.* is entitled by operation of law (*d*).

8. Ia

8. In the manor of *H.* it is the custom to grant copyholds for three lives *successive*. *S. D.* purchased an estate holden of this manor, and took the grant to himself, and *M.* his wife, and *W.* his eldest son, to take for their lives in succession. By will he devised all his interest in these copyholds (*int. al.*) to his youngest son. Question, if this was an advancement to *W.*, or whether he was trustee for his father? *Per curiam seriatim*—It is an advancement to the eldest son. Lord *C. B.* in delivering his opinion observed, that in the cases cited, the circumstance of the nominee being a child of the purchaser had been considered as a circumstance of evidence to rebut the resulting trust (and not as raising a consideration in itself, which seemed a more simple way of treating it). It was insisted that the custom of the manor required two nominees besides the purchaser, as taking off the inference of an intended advancement, and had been relied upon in that view by the Lords Commissioners in *Dickenson v. Shaw*, (in *Ch. May 1770*), in which case also the grant was for three lives *successive*. But, notwithstanding that authority, the court was of opinion this circumstance was not sufficient to turn the presumption against the child.

M. 1788, Scacc.
Dyer v. Dyer,
1 *P. Wms.* 112. (n.)

Vide *Lamplugh v. Lamplugh*,
1 *P. Wms.* 112. and the cases
there referred to.

See more of the Trust of Copyhold Estates,
post, tit. *Trust and Trustee*.

SEC. 14. Of the Widow's Free Bench.

1. A Copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave at his death. The widow is not bound by this agreement.

P. 1688, cor. Jeffries, *C.*

Mugrave v. Dabwood,

2 *Vern.* 45. 63.

1 *Eq. Abr.* 25. pl. 5.

Note, in *Hinton v. Hinton*,
Ambl. 227. Lord Hardwicke
questions this case; but his rea-

soning was against the sentiments of the bar. No statement of this case, however, appears in the register-book.

2. The widow of a *cestuy que trust* of a copyhold estate shall have her *free bench* as well as if her husband had had the legal estate.

H. 1706, cor. Cowper, *C. S.*
Orway Widow v. Hudson & al.

2 *Vern.* 58.

1 *Eq. Abr.* 120. pl. 12.

Vide *Sweetapple v. Bindon*. 2 *Vern.* 536.

3. *J. S.* was seised of copyhold lands within the manor of *W.* and *D.*, the custom of which is that the first wife shall have her free bench in all the land the husband was ever seised of during the coverture; that the second should have a moiety; and the

M. 1733, cor. Talbot, *C.*
Jordan v. Savage and others,
2 *Eq. Abr.* 102. pl. 8.

the third a third part, so long as she kept her husband above ground. J. S. in consideration of marriage with the daughter of A. covenanted within two months after the marriage to settle all his lands to the uses following; viz. As to the one part to him and his wife for life; remainder to his first son in tail male, &c.; remainder to the first and every other daughter in tail female; remainder to his own right heirs: as to the other moiety to himself for life, remainder *ut supra* to the issue, &c. provided that the lands not settled in jointure on his wife should be charged with the payment of 300*l.* for younger children's portions; provided also that the lands settled on the wife should be in lieu of her customary estate. By indorsement on the articles of the same date it was mutually agreed by all the parties that J. S. should have a power to charge the land not settled in jointure with 300*l.* for the payment of his debts. J. S. became a bankrupt, and died without performing the articles, or executing the power; and the assignees brought their bill against the heir and the younger children of J. S. to have 300*l.* which J. S. might have raised for the benefit of creditors; and the younger children filed their bill against the heir, the mother, and the assignees, to have their fortunes raised. On this case the points following were determined by King, C.; 1st, As the jointure settled on the wife is not made expressly in lieu of her free bench, but only mentioned in the proviso; and she being an infant at the time of making the articles, and not party to them, Whether she should be excluded from claiming her free bench; and it was held she should, and be obliged to abide by her jointure (a). 2dly, Whether the settlement should be carried into execution? and resolved it should; for as it must have been specifically executed against the covenantor if he had not become a bankrupt, so the assignees who stand in his place shall make it good. 3dly, Whether the power of charging the land with debts was vested in the assignees; and it was compared to a power of revocation which a man leaves unexecuted, and for which his creditors shall have remedy against the heir. Lord Chancellor decreed that the assignees who were in possession of the land should account for all the profits; for, as to the money chargeable on the estate, he said the charging it was a personal act, which not being done, he would not supply the defect. The court decreed

(a) *Vide Vizett v. Longdon*, W. Kel. 17. where money was settled on the wife before marriage for her provision and maintenance, and M. R. was of opinion she should have both that and her dower; but Ld. Chan. reversed the decree, and confined her to her settlement.

decreed the settlement should be strictly executed, and the reversion in fee to the assignees.

4. If a husband become entitled to a copyhold estate by copy of court-roll, and grants it out again by copy of court-roll, his wife is not entitled to dower; but if he becomes entitled otherwise than by copy of court-roll, and does not grant it out again by copy of court-roll, she is entitled to dower out of the estate.

5. Covenant by a deed before marriage to settle on the wife (if she survive) part of the real estate for her jointure, and in full recompence of all dower or thirds which she could any way claim, &c. out of any lands, &c. of which the husband was or should be seized of freehold or inheritance (a). The wife is thereby barred from claiming as her free bench copyhold purchased afterward (b).

(b) Lord Hardwicke said it would introduce a dangerous precedent in families to determine otherwise, as there are few estates that have not some copyhold mixed, of which, perhaps, the owner knows not; and it is proper in a case of this nature to put a liberal construction on the meaning of the parties.

6. A copyholder for lives, where there was a customary right for the widow to enjoy for life the whole estate of which her husband died seised, articulated for the sale of his estate for a valuable consideration, but died before the surrender. The widow contended her free bench was not bound by the articles. *Per Lord Hardwicke*—Where there is an agreement for the sale of a copyhold estate the court will decree a performance, even against the assignees of a bankrupt (c), and against an heir at law: so in strong equity the widow should be bound.

7. A devise to a wife in full of all dower or right of dower or thirds, held to extend to a customary right of free bench of a copyhold.

8. A widow shall not have free bench of a trust estate in a copyhold.

Vide Godwin v. Winsore, 2 Atk. 526. where Lord Hardwicke has laid it down as an established rule, that a wife is not dowable of a trust estate, *et vide* Colt v. Colt, 1 Ch. Rep. 254. Bottomley v. Fairfax, Prec. in Ch. 336. Chaplin v. Chaplin, 3 P. Wms. 234. Reynolds v. Miffing, and Robinson v. Tongue, cited 1 Atk. 604. Dixon v. Saville, 1 Bro. Ch. Rep. 326. *Vide* Hill v. Adam, 2 Atk. 208. Note; A distinction was attempted (in Banks v. Sutton, 2 P. Wms. 700.) in regard to a trust where it descends to the husband from another, and not created by himself; but that was over-ruled in Attorney-General v. Scott, Ca. temp. Talb. 138.

22 June 1738, cor. M. R.
Sneyd v. Sneyd, 1 Atk. 443.

17 Nov. 1747, Hardw. C.
Walker v. Walker, 1 Vesf. 54.
Note; The stat. 27 H. 8. does not extend to copyholds.
For free bench no writ of dower lies.

Vide Vizard v. Longdale, W. Kel. 17.

(a) Copyholds are inheritance by the custom of the realm.

14 July 1755, cor. Hardw. C.
Hinton v. Hinton, Amb. 277.
2 Vesf. 631. 633. 1 Eq. Abr. 70.
In this case Lord Hardwicke denied the authority of Musgrave v. Dathwood, 2 Vern. 45. 63. but his lordship's reasoning seemed to be against the sentiments of the bar.

(c) *Vide* Taylor v. Wheeler, 2 Vern. 564. 2 Salk. 449.

26 Feb. 1756, cor. Hardw. C.
Wards v. Wards, Amb. 299.
Vide Walker v. Walker, 1 Vesf. 54.

H. 1794, cor. Loughb. C.
Forder v. Wade & al.
4 Bra. Cb. Ca. 510.

17 Nov. 1796, cor. M. R.
Brown v. Raindle,
 3 Ves. jun. 256.

(a) 2 Ves. 631. 638.

§ Bill to foreclose and compel a surrender of a copyhold for three lives, under a covenant in the mortgage deed to surrender those premises as an additional security. *Quere*, Whether this covenant of the mortgagor barred his widow's right to free bench? The custom of the manor was, that the copyholder should convey by surrender; but where he died seised the widow was entitled to the estate as her free bench *dur. vid.* M. R.—The cited case of *Hinton v. Hinton* (a) is perfectly clear. The right of the widow of a copyholder arising out of her estate, which is in his power during his life, may be barred by him by any act done for a valuable consideration, whether conveying a legal estate or otherwise. It is very different from an estate tail with remainders over, for those estates are not in the power of the party till the recovery is suffered. They are not arising out of the estate of the tenant in tail. Suppose this a widow's estate arising out of an estate of which the husband was complete owner, and could bar her estate, it is that sort of estate which any equitable conveyance will bind. Any act of the husband for a valuable consideration bars her equally with a legal surrender, and she is compellable in equity to surrender pursuant to such contract. Decreed the widow to convey all her estate and interest according to the covenant in the mortgage deed, subject to redemption.

SEC. 15. Of the Enfranchisement, Merger, or Extinction of a Copyhold Estate.

M. 1681, cor. Finch, C.
Fawlkner v. Fawlkner,
 1 Vern. 21.
 1 Eq. Abr. 119. pl. 6.

H. 1685, cor. Guildford, C. S.
Dancer v. Boett, 1 Vern. 392.
 1 Eq. Abr. 119. pl. 8.

Vide Smith v. Murrin, Coke's
 Copyh. Cases, 24.

1. THE lord of a manor, where by the custom he has the cut of the woods growing on the lands, grants all the woods and underwoods growing and to grow on the copyhold, to the copyholder and his heirs; this shall not merge in the copyhold.

2. Copyholder in fee took an enfranchisement of his copyhold, in the name of a trustee, and then devised the land to his younger son, who sold to A. The heir at law of the copyholder recovered in ejectment, and A. thereupon brought a bill, and was decreed to hold and enjoy against the heir.

3. A. B.

3. *A. B.* tenant in tail of a copyhold, remainder to himself in fee, purchased the freehold of the land in his own name, and then sold to *J. S.* and died. After 30 years' possession the son of *A. B.* set up a title as issue in tail. Decreed that purchaser should hold against the issue in tail.

made no doubt but that the copyhold was merged, though it was said this point was depending on a special verdict at law. 1 Vern. 458.

H. 1685, cor. Guildford, C. S.
Parker v. Turner,
1 Vern. 393-458.
1 Eq. Abr. 119. pl. 7.
2 Ch. Rep. 174.

Note; This question came on again before Lord Chanc. Jeffries in P. 1687, when his lordship

4. The lord enfranchises a copyhold with all common thereunto belonging. Though the common is extinct in law, yet it subsists in equity, and decreed to the plaintiff the same right of common as belonged to the copyhold.

H. 1691, Canc.
Syngant v. Staker, 2 Vern. 250.
1 Eq. Abr. 104. pl. 10.
Vide 2 Cro. 253. Yelv. 189.
Mo 667. 1 Brownl. 173. 230.
4 Rep. 37. 1 Inst. 122. 8 Rep. 136.

5. *A.* is a copyholder in tail; the lord grants the freehold of the copyhold to him in fee: the copyhold, though entailed, is extinguished. Vide *Parker v. Turner*, 2 Ch. Rep. 174. and 1 Vern. 393. 458. where Lord Chancellor Jeffries delivered the like opinion in the like case. *Sed quare autem*—If *A.* be a copyholder in tail, remainder to *B.* in fee, and *A.* takes a grant from the lord of the freehold to him and his heirs, and dies without issue, is not *B.* in whom there was once a vested remainder in fee of the premises, entitled to the same?

T. 1724, cor. Macclesfield, C.
Dunn v. Green, 3 P. Wms. 9.

Vide ante, f. 7. pl. 5. S. C. more fully stated, with a note.

6. An enfranchisement of a copyhold by one having a partial interest, is for the benefit of all the remainder-men as well as himself. A recovery suffered by one not in possession has, therefore, no operation.

T. 1780, cor. Eyre, B. abf. C.
Wynne v. Cookes,
1 Bro. Ch. Ca. 515.

7. Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son, who by will charged all his real estates with debts and legacies, and devised them to his brother for life, with various remainders.

20 Feb. 1795, cor. Loughb. C.
Challoner v. Murball,
2 Ves. jun. 524.

Per Lord Chancellor—It is impossible any equity could keep alive this entail. No one could have a right against the tenant in tail. The case by Lord Jeffries (a) proves a plain proposition, that when the interest of the lord is united with the copyhold in tail there must be a merger, for the method of barring it cannot exist.

(a) Vide *Parker v. Turner*,
2 Ch. Ca. 174. 1 Vern. 392-
458. & vide *Dunn v. Green*,
3 P. Wms. 9. et ante, with Mr.
Coxe's notes subjoined.

C—o

Corporation.

SEC. I. Of Corporations Ecclesiastical, Civil, and Eleemosynary, in their aggregate Capacity; and of the Magistrates, Members, and Servants thereof individually.

H. 1682, cor. North, C. S.
Anon. 1 Vern. 117.
Vide Wych v. Mead, 3 P. Wms.
 310. Moodamy v. Morton,
 1 Bro. Ch. Ca. 469.

P. 1683, cor. North, C. S.
Nottingham Corporation,
 1 Vern. 155.

4 Mar. 1703, Dom. Prof.
African Company v. Deckwra
 & al. Colles' P. C. 327.
Pres. in Ch. 221. 4 Vin. Abr. 402.
 15 Vin. Abr. 316.
Vide Lady Gainborough v.
 Gifford, 2 P. Wms. 424. 2 Eq.
 Abr. 162. pl. 15.

1. **B**ILL against a corporation to discover writings—The court ordered the clerks of the corporation, and such of the principal members as the plaintiff should think fit, to answer on oath, and the master to settle the oath; for the corporation having put in their answer under their common seal, would disclose nothing to their prejudice.

2. Part of a corporation having surrendered their charter and taken a new one, the others, who insisted on their old charter, brought a *scire facias* to repeal the new charter, upon which the old sheriffs returned *scire feci*, which return was filed. Mr. Attorney-General now moved that the return might not be received, for that were to admit the old charter in being, contrary to the surrender. Objected that the new sheriffs, being defendants, could not return service on themselves, and that to move against the return would be to determine the question of right on the present motion. *Per Lord Keeper*—The king has a *quo warranto* depending against this corporation: if the parties who were against the new charter meant to outrun the king's action, it ought not to be suffered. His lordship thought the court ought not to interpose in such a case.

3. A company acting under a charter from the crown, unlawfully seise *A.*'s property to the value of 3000 *l.*; the company is put upon a new foundation by act of parliament, with additional stock and new adventurers. The new company shall make satisfaction to *A.* for the injury of the old company, and indemnify their servants, who had acted under their authority.

4. Where

4. Where a charter directs that the mayor shall continue in office until another is duly elected and sworn, the successor, though duly elected, cannot act till sworn; and if he does, judgment of ouster may be given against him.

11 Mar. 1725, Dom. Proc.
Pender v. Rex, 3 Bro. P. C. 173.
6 Vin. Abr. 297. c. 10.
Case of the Borough of Penryn in Cornwall.

5. The charter of a corporation directs, that the aldermen shall be chosen *annually*; yet this clause is only *directory*, and does not determine the office of alderman, at the end of the year after his election; but the person legally elected and sworn into the office, shall continue until his death or removal, in the same manner as a person elected into the office of mayor.

11 Mar. 1725, Dom. Proc.
Prousse v. Foot, 3 Bro. P. C. 167.
6 Vin. Abr. 297. c. 9.
Case of the Borough of Truro in Cornwall.

6. The acceptance of a charter, whereby the election of burgesses is directed in a manner different from what had obtained by ancient usage, the usage being inconsistent with the charter can no longer subsist; but is determined by the acceptance of the charter, which must afterwards be the only measure by which the election of burgesses is to be governed.

3 Mar. 1728, Dom. Proc.
Powell v. Rex, 3 Bro. P. C. 423.
Case of the Borough of Brecknock.

7. If lands are given to a corporate body, and the corporation is dissolved, the land will not escheat, but will revert to the donors.

6 Aug. 1740, cor. Hardw. C.
Attorney-General v. Lord Gower,
9 Mod. 226.
Vide 1 Inst. 13.

Note; This perhaps is the only instance where a reversion can be expectant on a grant in fee simple absolute.

8. The court of Chancery will not decree public companies to make calls in favor of a particular creditor, unless under very extraordinary circumstances.

24 Oct. 1740, cor. Hardw. C.
Case of York Buildings Company,
2 Atk. 56.

9. Where a certain number are incorporated, a major part of them may do any corporate act, though nothing mentioned in the charter.

T. 1741, cor. Hardw. C.
Attorney-General v. Davy,
2 Atk. 212.

It is not necessary that every corporate act should be under the seal of the corporation (a).

(a) *Vide* Attorney-General v. Scot, 1 Ves. 413.

10. The end of the present bill was to be relieved against the defendants, 50 in number, (who were either committee men or officers entrusted with the monies and stock of the corporation,) to have satisfaction for a breach of trust, fraud, and mismanagement. The bill stated the establishment of the corporation and the duties of the respective officers, and then the abuses committed. Lord Hardwicke, after recapitulating all the circumstances of

13 Aug. 1742, cor. Hardw. C.
The Charitable Corporation v. Sir Robert Sutton & al. 2 Atk. 405.
9 Mod. 349.

Note; The charitable corporation was established by charter in 1707, and their professed intention was to lend money at legal interest to the poor upon small pledges, and to persons of better rank upon indubitable security.—For an account of the

pernicious scene of villainy which occasioned the dissolution of this corporation, see the Journals of the House of Commons, or the History of England, Anno 1732.

of the extraordinary confederacy and prodigious loss which had happened in this case, proceeded to give his opinion upon the situation and liability of the individual officers. His lordship observed that the office of a director is of a mixt nature; public as arising from the charter of the crown, but at the same time is not an employment that affects the public government; for none of the directors of the great companies are required to qualify by taking the sacrament.

Committee men are properly agents to those who employ them in the trust to superintend the corporation affairs. In this respect they may be guilty of malfeasance or nonfeasance (a). Yet where acts are done within their authority, as repealing bye-laws and making orders, though they may be attended with bad consequences, it will be difficult to determine that they had foreseen what would happen, and that they were therefore guilty of a breach of trust. A gross non-attendance in a committee man may make him guilty of the breaches of trust committed by others; and a trustee's saying he had no benefit from the trust, but that it was merely honorary*, is no excuse for his want of diligence (b). Where a supine negligence appears in all the committee, by which a complicated loss has happened, they are all guilty (c), and a court of equity can lay hold of every breach of trust, whether public or private. The tribunals of this kingdom are wisely formed of courts both of law and equity; there cannot, therefore, be an injury but there must be a remedy. In the present case Lord Hardwicke said, one thing was clear, that five of the persons who appeared to be immediately concerned in the conspiracy were liable to make good the losses in the first place, and that the committee men who were not partners in the affair were liable in the second place only, as having connived at it, and not making a proper use of the powers vested in them by the charter to prevent the ill consequences of such a confederacy. The bill must be dismissed as to such few of the defendants against whom the charges cannot be supported; and, with respect to the rest, they must be responsible for the losses according to their relative situations in the corporation. Referred to the Master to examine all books, papers, and other matters, and to report the

(a) *Vide* Domat's Civ. Law, 2 B. tit. 3. sec. 1, 2.

* *Vide* Ayliffe v. Murray, 2 Atk. 60.

(b) *Vide* Coggs v. Bernard, 2 Salk. 26. *Shields v. Blackburn*, 1 H. Blackst. Rep. 158.

(c) *Vide* Lechmere v. Lord Carlisle, 3 P. Wms. 215.

§ 1. *Magistrates—Members—Servants.*

C—o 333

the whole of the loss; and the further consideration postponed until after the Master's report.

11. No interest can pass out of a body corporate at law, unless under their common seal.

4 April 1747, cor. Hardw. C.
Dr. Winne v. Bampton & al.
3 *Atk.* 475, 476.
Case of the Canons of Sarum.

Bodies corporate, especially ecclesiastical, differ extremely from private persons; and the rule for carrying agreements into execution as to private persons, will not hold generally as to aggregate bodies.

If a body corporate makes an agreement with a person to grant him a lease, and the money is paid, though some of the members of that body are wanting, equity will carry it into execution.

A dean and chapter ought not to suffer any immediate advantage to themselves (in filling up vacant lives) to bias their minds, in taking a less fine, to the prejudice of their succession, for they have a trust reposed in them by the crown or by their founders, and they ought to have their succession principally in view.

12. A lay corporation may incorporate new members, if they do not abuse their power.

P 1747, cor. Hardw. C.
Attorney-General v. Talbot,
1 *Ves.* 78.

See this case at large, *ante*, tit. *Charity*.

13. Visitation powers ought not to be extended, being summary and arbitrary, and therefore liable to many abuses. A free school founded by charter, with proper powers, must be regulated by the charter, and not in equity, as in cases where there is no charter (*a*).

4 July 1751, cor. Hardw. C.
Attorney-General v. Middleton,
2 *Ves.* 329.

(a) See this case at large,
ante, tit. *Charity*, where see the
several cases on the subject of visitation and visitatorial power.

No technical words are necessary for granting visitatorial power. It may be divided.

Vesting the legal estate of a charity in the governors, excludes them not from being visitors; *scilicet* where they are to receive the revenue.

Vide *Attorney-General v. Foundling Hospital.*

Where there is no charter, an information for charity is not dismissed, though the relief prayed fails: otherwise where there is a charter.

14. Equity will not interfere in the appointment of general visitors to a school, where there are particular powers given by charter; but it will as to the management of the revenue, and make the master, upon collusion with the usher, account for 15 years' arrears of the usher's salary.

15 July 1754, cor. Hardw. C.
Attorney-General v. Corporation of Bedford, 2 *Ves.* 505.
See this case more fully, *ante*,
tit. *Charity*, sec. 1.

T. 1796, in Scacc.
London Corporation v. Liverpool Corporation, 3 *Anst.* 738.

15. A corporation may join in a suit to establish a claim of exemption from tolls in favour of its individual members.

SEC. 2. Of the Power of Corporations aggregate; and herein of their Bye-Laws.

H. 1723, cor. Macclesfield, C.
Child v. Hudson's Bay Company,
 2 *P. Wms.* 207, 8, 9.

Vide Gibson v. Hudson's Bay Company, 1 *Str.* 645. 7 *Vin.*
Abr. 125. pl. 2. *Meliorucchi v. Royal Exchange Company*,
 1 *Eq. Abr.* 8. pl. 8.

(a) *Vide* 6 *Geo.* 1. c. 18. which declares all projects and insurances to be illegal.

H. 1725, cor. King, C.
Eden v. Foster, 2 *P. Wms.* 325.
 See this case at large, *ante*, tit. *Clarity*.

M. 1726, cor. King, C. cum assist.
Gibson & al. Assignees v. Hudson's Bay Company, 1 *Str.* 645.
 2 *Eq. Abr.* 122. pl. 2.
 7 *Vin. Abr.* 125. pl. 2.
Vide Meliorucchi v. Royal Exchange Company, 1 *Eq. Abr.* 9. pl. 8.

Note; In the quotation of this case, 1 *Eq. Abr.* 9. pl. 8. it is stated that there was a bye-law which subjected every member's stock to his debts to the company, on which the decree was founded, but the general doctrine was exploded.

1. **H**UDSON's Bay Company and other corporations may, by their bye-laws, make restrictions upon their stock, viz. that it shall first be liable to pay the debts due to themselves from their own members, or to answer the calls of the company upon their stock.

So a bye-law of a company to seize a member's stock for a debt due from the member to the company is good; but if this debt be not due to the company but to their trustee, then the bye-law will not extend to it.

A corporation without any express power by their charter may of course make bye-laws; but if they have a particular power to make bye-laws for the management of their trade, they cannot make bye-laws for carrying on projects (a) foreign to the affairs of the corporation.

2. A power may be given to commissioners to make bye-laws; but where such power is too extensive, it will be void *pro tanto*.

3. *J. S.* in 1711 had 5000 *l.* stock in the *Hudson's Bay Company*, and was their banker or cashier, and upon that account he was indebted to the company in 800 *l.*, and soon after became a bankrupt. The assignees brought a bill against the company, to transfer the 5000 *l.* to them with the dividends. The company by their answer insist, that by virtue of a bye-law the stock and dividends of each adventurer shall be obliged to such debts and engagements as such adventurer shall become engaged in to the company, and that the committee of the company for the time being shall and may distrain the same until such debts and engagements are fully satisfied: that the company is not obliged to transfer the stock to the plaintiffs until they pay the 800 *l.* due to the company; and they also insisted upon the clause in the *stat. 5 Geo. 2. c. 30. s. 28.* of setting off debt against debt; and that *J. S.* having credit in their books for

§2. Aggregate Power—Bye-Laws.

C—o 335

for 5000*l.* stock, and the company on the other hand have credit in *J. S.*'s books for 800*l.*, they may deduct and have an allowance of the 800*l.* out of the 5000*l.* stock. Lord Chancellor *King* was of opinion that the *bye-law* was not good; but *Raymond C. J.* and *Price B.* who assisted his lordship, thought it a good *bye-law*. But Lord Chancellor thought this case to be within the clause of the above statute, and therefore said, he need not give any direct opinion as to the *bye-law*; that here was mutual credit given; and therefore decreed that the company may retain the 800*l.* out of the dividends due to the bankrupt's estate, subsequent to the bankruptcy, and shall not be obliged to come in as a creditor under the commission.

4. Plaintiffs were assignees under a commission against Sir *J. B.*, and brought this bill against defendants, to compel them to transfer to plaintiffs several shares in their stock to which Sir *J. B.* was entitled. It appeared that Sir *J. B.* was a director of the company, and having so large a portion of stock, the company lent him 12,000*l.* but not upon the security of his stock, yet the company insisted on a right to stop the stock until re-payment. *Per cur.*—Defendants must permit plaintiffs to transfer the stock, since they cannot retain it under the statute of 5 *Geo. 1.*, for the loan was not made by defendants in their corporate capacity, but as private persons.

5. The charter of a corporation directs the mayor to be annually chosen out of four of the *burgesses* or *inhabitants*, but by a *bye-law* it is ordained, that these four *burgesses* or *inhabitants* should be all of them *aldermen*. This *bye-law* is void, as being repugnant to the charter; and judgment of *ouster* shall be given against a mayor elected in consequence of such *bye-law*.

6. It is strange to go into equity to execute the statutes of a private foundation under a charter. Where such statutes do not appear to have been observed in any one instance, a repeal of them must be presumed. A court of law would do so on evidence to a jury, for the rule is, that a corporation has power to make *bye-laws*. A court of law will direct a jury to find a *bye-law*, and on account of non observance, will presume a subsequent *bye-law* to repeal and alter.

T. 1728, cor. M. R.
Melioru: cbi v. Royal Exchange Assurance Company,
1 *Eq. Abr.* 9. pl. 8.
Vide Demainbray v. Metcalfe,
2 Vern. 691. *Gibson v. Hudson's Bay Company*, 1 *Str.* 645.
2 *Eq. Abr.* 122. pl. 2.

1 Dec. 1742, Dom. Proc.
Tucker v. Rex, 4 Bro. P. C. 455.
Case of Weymouth Corporation.
It appears that the House divided on this question. The judges present were *Willes, C. J.* *Dennison, Burnet, Abney, Reynolds, and Carter, J.*

4 July 1751, cor. Hardw. C.
Attorney-General v. Middleton,
2 *Ves.* 330
Vide S. C. at large, ante, tit. Charity, sec. 14

SEC. 3. Of Sole Corporations.

H. 1722, cor. M. R.
Attorney-General v. Ruper,
 2 P. Wms. 126.
 2 Eq. Abr. 293. pl. 18.

(a) *Vide* F. N. B. 91. K.

H. 1723, cor. Macclesfield, C.
Whitmore v. Bridges,
 2 Eq. Abr. 204. pl. 5.
 4 Vin. Abr. 525. pl. 1. in *Marg.*

23 May 1750, cor. Hardw. C.
 and M. R.

Green v. Rutherford,
 1 Ves. 462. to 475.

(a) See this case at large, ante,
 tit. Charity.

1. THE parson is a corporation for taking of lands for the benefit of the church, as the churchwardens are for personal things, such as money or goods which are *bona ecclesie*, and for which the churchwardens for the time being may maintain trespass (a).

2. It is said in the books, that the churchwardens are a corporation, but very *improperly*, for all the parishioners are the body, and the churchwardens are only a name to sue by in personal actions, but the property is in the parishioners; and in all actions brought by churchwardens, it must be laid *ad damnum parochianorum*.

3. If the crown after the foundation of a college grants an advowson or land to the senior fellow, such grant will operate to make him a sole corporation (a); and the bishop cannot take away the legal estate vested in a sole corporation, though it happened to be part of the aggregate body, and give it to the aggregate body.

SEC. 4. Of the Power and Duty of a Corporation as Trustees; and herein of their Neglects, Defaults, and Liability, as well in their Corporate as in their Individual Capacity.

H. 1700, cor. Wright, C. S.
Lydiatt & al. v. Sir John Fouch,
 2 Vern. 411, 412.
Case of Feigned Hospital in Essex.

10 June 1713, Dom. Proc.
Corporation of Hertford v. The
Poor of Hertford,
 1 Bro. P. C. 399.

11 Mar. 1710, Dom. Proc.
Coventry City v. Attorney-General
and Trustees of Sir Thomas White's
Charity, 2 Bro. P. C. 236.
Colles' P. C. 280.
 4 Vin. Abr. 456. pl. 16.
 2 Eq. Abr. 198. pl. 3.

1. THE corporation of a charity founded by charter are but trustees for the charity, and may improve, but cannot do any thing to the prejudice of the charity, or in breach of the rules of the founder.

2. A corporation being trustees for a charity, and in possession of the charity estate, and suppressing or concealing any evidence relating to the charity, are liable to the costs of the suit.

3. A corporation being trustees of a freehold estate for the benefit of a charity, and grossly misbehaving themselves in the execution of their trust, affords a sufficient reason for the court of Chancery

to direct the trust estate to be conveyed to persons more able and willing to execute the trust faithfully, for the benefit of the poor.

4. A corporation being restrained by its statutes from making any leases except for 21 years, and at a rack rent, recommend their successors to grant a new lease to a tenant (who had laid out money in repairs) at the old rent, and a contract was signed in the audit book (for granting such new lease) by the master and most of the fellows. Lord Chancellor thought the recommendation a breach of the statutes: the contract should have been under the common seal, and if the tenant had laid out money in confidence of the contract, his remedy was against the private persons signing such agreement: Bill to compel the college to make a new lease dismissed with costs.

M. 1730, cor. Parker, C.
Taylor v. Dulwich Hospital,
1 P. Wms. 655.
2 Eq. Abr. 198. pl. 2.

5. A corporation being empowered by charter to appoint a schoolmaster, must, in every matter relative to that appointment, adhere strictly to the tenor of their charter; and, upon neglecting so to do, are liable to costs.

28 Feb. 1726, Dom. Proc.
Corporation of Salop v. Attorney-General, 3 Bro. P. C. 241.
Bunb. 215.

6. A director, committee-man, or trustee of a corporation, supinely negligent or grossly non-attendant, is guilty of the breaches of trust committed by others; and his saying his trust is merely honorary, is no excuse for his want of diligence; he is therefore liable in equity (which can lay hold of every breach of trust either public or private) to contribute in the second degree to any complicated loss which may happen by reason of his neglecting to exercise the powers invested in him to prevent such a loss.

11 Aug. 1742, cor. Hardw. C.
The Charitable Corporation v. Sir Robert Sutton & al. 2 Atk. 403.
9 Mod. 349.

See this case at large, ante, sec. 1.

Vide Ayliffe v. Murray, 2 Atk. 60.
Coggs v. Bernard, 1 Salk. 26.
Lechmere v. Carlisle, 3 P. Wms. 215.
Shields v. Blackburn, 1 H. Blackst. 253.

SEC. 5. Of Suits by and against Corporations; and herein of Informations in Nature of *Quo Warranto*.

1. BILL against a corporation to discover writings; the court ordered the clerks of the corporation, and such of the principal members as the plaintiff should think fit, to answer on oath, and the Master to settle the oath; for the corporation having put in their answer under their common seal, would disclose nothing to their prejudice.

H. 1682, cor. North, C. S.
Ann. 1 Vern. 117.
Vide Wych v. Meal, 3 P. Wms. 310.
Moodamy v. Morton, 1 Bro. Ch. Ca. 469.

VOL. II.

Z

2. Plaintiff

M. 1700, cor. Wright, C. S.
Harvey v. East India Company,
Proc. in Ch. 129. 2 *Vern.* 395.

In *Dr. Halmon v. Hambro*
Company, cited, the members in
 their private persons were made
 liable, the company having no
 goods.

2. Plaintiff had a decree against the defendants for a great sum of money, and served them with a writ of execution in the usual form, and they not performing the decree, a *distringas* (the next process against a corporation) was awarded and 40s. issues returned; and afterwards, on motion, a sequestration *nisi* was ordered; and defendants prayed to enter their appearance with the register upon the *distringas*, and to discharge the sequestration. *Per Curiam*—A *distringas* issues for the very purpose of compelling an appearance, which being entered by common persons is in favour of liberty, but that is of no service to a corporation, for they cannot be committed; the process therefore must go on. Defendants then prayed a further day to be heard, which being granted, they appeared and made several objections to the service.

Objected 1st, That there were several variances between the writ of execution and the copy served.—Over-ruled; for that the variances were immaterial.

2dly, That the writ was not for the whole of the decree; the decree *quod computet* was left out, and the money reported due by the Master only stated.—Over-ruled; for that the writ need not contain more.

3dly, That the service was on the governor only, who had no power over the company's cash, and that it ought to have been on the committee.—Over-ruled; for the committee might not meet or admit the party to serve them. Order made absolute.

M. 1719, cor. Parker, C.
Corporation of Colchester v. —
 1 *P. Wms.* 595. (n.)

3. The method of disfranchising a member of a corporation, in order to enable him to become a competent witness, is by an information in nature of a *quo warranto* against the member, who confesses the information, on which plaintiff obtains judgment to disfranchise him.

T. 1734, cor. Talbot, C.
Wych v. Mead, 3 *P. Wms.* 310.
 2 *Eq. Abr.* 78. pl. 8.

4. The secretary and book-keeper of the *East India* company were made defendants to a bill for discovery of some entries and orders of the company: the defendants demurred, for that they might be examined as witnesses; also because their answer could not be read against the company.—The demurrer over-ruled, lest there should be a failure of justice, in regard the company are not liable to a prosecution for perjury, though their answer be never so false (a).

(a) So the practice has continued ever since.

Vide Moodamby v. Morton,
 1 *Bro. Ch. Rep.* 469.

5. An

5. An information in nature of *quo warranto* upon 9 *Ann. c. 20.* for usurping the office of free burgess, does not lie against the mere claim of one, who, though elected, never was admitted; nor against a member, till removal by the corporation.

The King may, at his discretion, seize the franchise of a corporation, guilty of an offence amounting to a forfeiture.

6. In *Hilary* term 1686, an information, in the nature of a *quo warranto*, was brought in the court of Exchequer in *Ireland* against the corporation of *Drogheda*; and in *Easter* term following judgment was given against them, and their liberties, &c. seized into the King's hands. Held, that this information would not lie in that court, and that therefore the judgment was void.

S. C. In consequence of that judgment King *James II.* created a new corporation by charter, who made a reversionary lease to *J. S.* of some lands belonging to the old corporation. This charter being declared void by an act of *1 Will.* and *Mary, s. 2. c. 9.* the lease is void also.

M. 1755, B. R.
Rex v. Penfesty, Sayer, 247.
But more correctly in 1 *Ves. 1 to 9.*
The reversal of the judgment of the court of K. B. in *Ireland* affirmed in parliament, 5 *Bro. P. C.* 287. *Case of the Borough of New Town in Ireland.*
Vide Bagg's case, 11 Co.

10 May 1759, Dom. Proc.
Pippard, Esq. v. Drogheda Corporation, 5 Bro. P. C. 369.

SEC. 6. In what Cases the Members of Corporations aggregate shall be deemed competent Witnesses; and herein of disfranchising a Member for the Benefit of his Evidence.

1. THE question in this case was, Whether a bond for 200*l.* was intended for the benefit of the plaintiffs or of the defendant? Plaintiffs' witnesses were all members of the corporation, and therefore objected to as witnesses, and the exception was allowed. Lord Keeper said every corporation ought to have a town clerk and other clerks, who were not freemen, that they may be competent witnesses if necessary. But it at length appearing that defendant had cross-examined some of plaintiffs' witnesses, Lord Keeper said, that cross-examining a witness by one side, in any matter tending to the merits, makes him a good witness for the other side, though otherwise liable to exception.

24 O.R. 1684, cor. North, C. S.
Corporation of Sutton Coldfield v. Wilson, 1 Vern. 254.
A legatee for an inconsiderable sum is competent to prove a will
Per C. S. in S. C.

T. 1700, Canc.
Dr. Steward v. East India Company, 2 Vern. 380.
 9 Mod. 387. 1 Eq. Abr. 40. pl. 3.
 73. pl. 14.

It is a principle that a mere witness shall not be made a party to a bill. *Vide Newman v. Godfrey*, 2 Bro. Ch. Ca. 332.

2. Bill to be relieved against an award made by some of the members of the *East India* company, and the arbitrators and some of the particular members are made defendants; they may demur to the whole bill without answering to the fraud charged, for the plaintiff can have no decree against them, nor can the answer be read against the company; but they ought to be examined as witnesses.

M. 1719, cor. Parker, C.
Corporation of Colchester v. —,
 1 P. Wms. 595. n.

3. If a corporation would make use of one of their own members as a witness, they must disfranchise him.

Note; The method of disfranchising is by an information in the nature of a *quo warrantis* against the member, who confesses the information on which plaintiff obtains judgment to disfranchise.

See *ante* tit. *Charity and Charitable Uses*.

See also *Bank of England*. *East India Company*.
South Sea Company.

See also *Trading Companies*, or *Corporations trading under Charter*, *post*. tit. *Trade*.

C—o

Costs.

SEC. 1. In what Cases Costs are allowed or refused by the Court (a); whose Person or Estate is liable to Costs; how the Parties entitled to Costs shall obtain them; and what is the Course of the Court with respect to Costs.

(a) *Note*; Costs in equity are entirely discretionary, and not conformable to the rules of law where *unica directio fiat damnum*, and the courts wait till final judgment. *Vide Jones v. Coster*, *post*, in this section, and the cases there referred to.

H. 1682, cor. North, C. S.
Ann. 1 Vern. 116.
 1 Eq. Abr. 125. pl. 3.
Vide 1 Vern. 334.

Note; Before this regulation in practice, the costs, of course, on dismissal, were 20s. only.

1. ON motion to dismiss a bill after answer put in, the court ordered that for the future the defendant in such case should have his full costs taxed.

M. 1682, Canc.
Durdant v. Ridman, 1 Vern. 78.
 Said per Lord Talbot in *Tourton v. Flower*, 3 P. Wms. 371.
 that this is not now the practice,

2. Where a defendant has demurred, he may assign another cause of demurrer at the bar, paying costs; and if such demurrer is over-ruled, he must pay double costs.

3. Where

§ 1. *Allowed or refused—who liable, &c.*

C—o 341

3. Where an officer agrees to surrender his commission and does surrender accordingly, but admittance is refused to the surrenderee in his stead, the court will not relieve save only against interest and costs.
M. 1682, cor. Finch, C. Burrisford v. Dani, 1 Vern. 93, 99. 1 Eq. Abr. 35. pl. 2. Vide Morris v. McCulloch, Amb. 432.
4. Mortgagor brought his bill in the Exchequer to redeem, and mortgagee brought his bill in Chancery to foreclose. The mortgagor was ordered by the court of Chancery to pay costs, and his plea of the pendency and priority of his own suit was over-ruled.
H. 1683, cor. North, C. S. Earl of Newburgh v. Wren, 1 Vern. 221. 1 Eq. Abr. 134. pl. 3. Vide S. C. ante, tit. Bill, l. 15. pl. 2. and notes.
5. Bill of review allowed to be brought without paying the costs decreed in the original cause, upon the plaintiff's making oath that he was not worth 40*l.* besides the matters in question.
M. 1684, Canc. Fitton v. Lord Macclesfield, 1 Vern. 264. 1 Eq. Abr. 82. pl. 11. Note; It appears that the now plaintiff had been in execution near 20 years for the costs in the original suit.
6. Where the defendant takes out a commission, and returns only a demurrer; though the demurrer is allowed, yet the defendant shall have no costs.
M. 1684, cor. North, C. S. Esh v. Shawe, 1 Vern. 282. 1 Eq. Abr. 125. pl. 6.
7. Though the plaintiff abated her own suit by marriage, yet she had the costs of the whole suit, deducting only the charge of the bill of revivor.
P. 1685, cor. Guildford, C. S. Durbain v. Knight, 1 Vern. 318. 1 Eq. Abr. 126. pl. 7.
8. Plaintiff, a second mortgagee, contesting the validity of the first mortgage, was ordered to pay five marks costs, not having made the mortgagor a party.
P. 1688, cor. M. R. Thompson v. Bafterville, 3 Ch. Rep. 215.
9. If a new trial, or a second issue be directed, it must be upon payment of costs.
T. 1688, cor. Jeffries, C. Edwin v. Thomas, 2 Vern. 75. 1 Eq. Abr. 125. pl. 5.
10. Plaintiffs, daughters by a second ventre, brought their bill against defendants, daughters by a first ventre, to prove their father's will, whereby lands were devised to be sold to raise plaintiffs' portions; and on a trial at bar and verdict for the will, defendants were ordered to join in a sale; but were allowed their costs (a) both at law and in equity.
T. 1699, Canc. Crew v. Joliffe, Prac. in Ch. 93. 2 Eq. Abr. 257. c. 1. (a) Vide Biddulph v. Biddulph, 2 P. Wms. 285. Luxton v. Stephens, 3 P. Wms. 373.
11. The commissioners of charitable uses cannot decree costs on the *stat. 43 Eliz.*; but if there be an appeal from their decree, Lord Chancellor may decree the costs, not only of the appeal, but likewise of the commission. And although they do decree costs;

Z 3

costs; yet that shall not, upon an appeal, be sufficient to reverse the decree; for Lord Chancellor may either increase or lessen the costs, or exempt the party from them entirely.

P. 1701, cor. Somers, C.
Scotchman v. Paulard,
2 Eq. Abr. 125. pl. 30.

30 May 1701, Dom. Proc.
Kirby, Executrix, v. Ormsby,
Coles' P.C. 134.
Note: The decree on this ap-
peal does not appear.

1702, Scacc.
Warburton v. Warburton,
2 Eq. Abr. 237. pl. 30.
6 Vin. Abr. 322. pl. 30.

P. 1703, cor. Wright, C. S.
Angell v. Smith, Prec. in Ch. 219.
2 Eq. Abr. 633. c. 1.

H. 1706, cor. Cowper, C. S.
Parrot v. Treby, Prec. in Ch. 254.
1 Eq. Abr. 125. pl. 4.

H. 1705, cor. Cowper, C. S.
Nash v. Lord Derby, 2 Vern. 537.
1 Eq. Abr. 126. pl. 11.

It seems by this case that the tenant was saddled with the costs, because he set up a pretended custom.

(a) But if the case were such as that the court could not relieve, it would not decree costs against him. 1 Eq. Abr. 126. pl. 11.

H. 1708, cor. Cowper, C.
Kirk v. Clarke, Prec. in Ch. 275.
2 Eq. Abr. 165. pl. 5.

12. *A*. brought a bill in *forma pauperis*, to which defendant put in a plea and demurrer, both of which were over-ruled.—*Per cur.* Plaintiff shall have his costs like other suitors; for though the plaintiff is at no costs himself, yet the counsel and clerks do not give their labour to defendant but to the pauper.

13. It seems, that where the party to pay deposits the sum which reasonably can be demanded, he is not to pay costs on his adversary obtaining a decree for the sum decreed.

14. It is the course of the court of Exchequer that the plaintiffs shall have costs where they recover, without any order for them.

15. The plaintiff, a pauper, had a decree for the duty and costs, and the Master taxed full costs. On motion it was ordered that the plaintiff and his solicitor do make oath before a Master of what they had paid, or were to pay, and that such costs only be allowed.

16. On a bill to call a trustee to account, he by answer submits readily to it. Though found in debt, he shall pay interest for the balance only from the time of the account liquidated, and no costs. *Secus*, if he controverts the account; for then, if found in arrear, shall pay interest and costs.

17. *A*. having two copyholds which he held of the manor of *B.*, cut timber on the one, and employed it in repairing the other. After a verdict in ejectment by the lord for the forfeiture, *A*. brought a bill, and was relieved, but was ordered to pay the costs both at law and in equity (a).

18. A trustee having filed a bill to compel a specific performance of marriage articles, did not make the *cestui que trust* a party. Decreed, he should make *cestui que trust* a party, and pay the costs of the day.

§ 1. *Allowed or refused—who liable, &c.*

C—O 343

19. If a bill be brought in equity for a partition, no costs can be on either side, because it is an amicable suit. So it is at law.

Vide Metcalfe v. Beckwith, 2 P. Wms. 376.

20. Although an answer confesses every thing that is prayed by the bill, so that the plaintiff in that case need not be at the trouble of proving it, yet if the defendants are infants, the court will compel the plaintiff to prove every thing; which he did, and had a decree; whereupon it was prayed that the plaintiff should have costs for all, and not for bill and answer only: which was granted.

Lord Chancellor would not allow a mortgagor to redeem until he paid the mortgagee's costs; and said, a redemption was never decreed without costs; but if the mortgagor only joined in the sale of lands, (the bill being for that end,) he shall not pay costs.

See his costs.—If the tender is only by the answer, the defendant must account with costs.—*Bunb. 28.*

P. 1708, cor. M. R.
Ann. 6 Vin. Abr. 332. pl. 31.
2 Eq. Abr. 237. pl. 4.

T. 1708, cor. Cowper, G.
Ann. M. S. Rep.
2 Eq. Abr. 237. n. 10. C. 11.

If to a bill for tithes defendant does not show a tender before, or make it in the answer, the plaintiff is entitled to an account, although the value be never so small.—If there be a tender before, and the tender is also made by the answer, the defendant

21. A. in his sickness surrendered his copyhold estate to himself and his wife for their lives, remainder to his right heirs. It appeared that he declared he made the surrender on condition, that if he recovered, the surrender should be returned to him, and his wife should have 100*l. per annum*. A. did recover, and demanded his surrender, which was refused. He then made a second surrender of 100*l. per annum* only to his wife, and died. The court looking on this surrender, though conditional, as a security to the wife for the 100*l. per ann.* decreed costs out of the estate, as where a person comes to redeem.

M. 1709, cor. Cowper, C.
Maplecroft v. Maplecroft,
Gilb. Eq. Rep. 2.

22. Where a testator, by his own conduct, makes it necessary for his devisee to file a bill for the establishment of his will, and the will is set aside, as having been revoked by a subsequent conveyance, such bill ought not to be dismissed with costs.

15 May 1713, Dom. Proc.
Husband, alias Pollen, and another
v. Husband, Bart. and others,
1 Bro. P. C. 387.
1 Eq. Abr. 412. c. 12.
6 Vin. Abr. 365. c. 10.
3 Vin. Abr. 147. c. 24.

23. Costs generally follow the event of an account; but where the account is intricate or doubtful, there should be no costs.

8 May 1716, Dom. Proc.
Pitt v. Page, 1 Bro. P. C. 550.
6 Vin. Abr. 332. c. 36. 365. c. 11.
2 Eq. Abr. 237. c. 7.

24. The plaintiff accepting a third answer before he receives his costs for the second answer, does not waive them; but he may take out a *subpoena* for them.

H. 1718, in Scacc.
Brotherton v. Chancery, Bunb. 34.

9 Mar. 1718, cor. Cowper, C.
Morison v. N. Pitt,
 2 Eq. Abr. 632. pl. 4.
 16 Vin. Abr. 257. pl. 2.

P. 1718, cor. Jekyll, M. R.
Tieburn v. Leigh,
 2 Eq. Abr. 238. pl. 10.
 6 Vin. Abr. 365. pl. 14.
 Bill by an administrator; defendant demurs; demurrer allowed; bill dismissed with costs; and so said to be the constant course in equity. *Per tot. curiam*—Fraser, Administrator, v. Moore, 1720, Bunb. 63.

P. 1718, cor. Parker, C.
Stafford v. City of London,
 1 P. Wms. 428. 3 Stra. 95.
 2 Eq. Abr. 1. n. 10 pl. 3.
 166. pl. 9. 244. pl. 18.
 (a) *Vide contra* Anon. 2 Atk. 15. where Lord Hardwicke said a bill was never dismissible for want of parties, and mentions two decrees of dismissal for that cause, which were reversed by the Lords, one of which seems to be *Green v. Poole*, 4 Bro. P. C. 122.

M. 1718, cor. Parker, C.
Spale v. Sir John Barrington,
 1 P. Wms. 482.
 2 Eq. Abr. 237. pl. 8.
Vide Webb v. Claverden,
 2 Atk. 424. *Berney v. Eyre,*
 3 Atk. 387. *Leman v. Alie*, Amb. 163.

M. 1718, in Scacc.
Walter v. Ruffel, Bunb. 90.

M. 1718, in Scacc.
Seymour v. Rapiet & al,
 Bunb. 28.

2 Dec. 1718, Canc.
India Company v. Elkins,
 2 Eq. Abr. 238. pl. 9.
 6 Vin. Abr. 365. pl. 13.

M. 1719, cor. Cowper, C.
Bishop of Durham v. Lyddal,
 2 Eq. Abr. 175. pl. 11—13.
 4 Vin. Abr. 415. pl. 2.
 2 Bro. P. C. 22.

See this case more fully, *ante*, tit. Bill, §. 7. pl. 17. and notes.

P. 1720, in Scacc.
Fraser v. Moore, Bunb. 63.

25. Appellant to pay the costs of the day for want of proper parties, and to be at liberty to amend his bill.

26. If a bill is brought for a matter properly determinable at law, the defendant ought to demur, and not suffer the cause to go on to a hearing; and if the bill be dismissed upon hearing, the defendant shall not have costs.

27. Where a bill wants proper parties, the court can (a) either dismiss it without prejudice, or give leave to amend on paying the costs of the day.

(a) *Vide contra* Anon. 2 Atk. 15. where Lord Hardwicke said a bill was never dismissible for want of parties, and mentions two decrees of dismissal for that cause, which were reversed by the Lords, one of which seems to be *Green v. Poole*, 4 Bro. P. C. 122.

28. An heir at law, or even an heir male to the honor of the family, if there be probable cause to contend for the family estate, shall not pay costs.

29. Where a decree nisi is made absolute at the day, by the defendant's default, if he petitions for a re-hearing he must pay 10/. costs.

30. Bill for tithes. If defendant shews a tender made before, and also makes a tender by his answer, he saves his costs; but if the tender is only by the answer, he must account with costs.

31. A decree for costs necessarily follows a decree for payment of principal and interest.

32. After a decree for quieting plaintiff in possession, and that defendant should pay costs, defendant moved for leave to file a bill of review, and then a question arose, Whether he should have leave without first paying the costs decreed? *Per Lord Chancellor*—He shall not; for payment of costs ought to be performed rather than any other part of the decree, and bills of review may not be filed without leave of the court.

33. A plaintiff, administrator, pays costs in equity.

34. Upon

§ 1. *Allowed or refused—who liable, &c.*

C—o 345

34. Upon a motion that T. might pay costs for not moving according to notice (which was denied *per totam curiam*) it was said by one of the barons, that if there are three notices of motion and then a fourth, they shall not move upon the fourth without paying the costs of the three first.

M. 1721, in Scacc.
Tarent v. Tretwit, Bumb. 86.

35. Wherever there is a bill for a discovery only, the plaintiff shall pay the costs of dismissing his bill, although he has a discovery by the answer, and although the defendant was the occasion of the bill by his false plea at law.

H. 1721, in Scacc.
Calverly v. Parker, Bumb. 124.

36. Legatee or creditor coming in before a Master for his legacy or debt, shall have his costs; for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge.

T. 1721, cor. Macclesfield, C.
Maxwell v. Wattenhall,
2 P. Wms. 27.
2 Eq. Abr. 238. pl. 11.

37. In case of an issue out of Chancery, and plaintiff does not proceed to trial according to his notice, nor countermand it, that court, on motion, will give costs, without sending the party to a court of law:—and it is proper to move that court for such costs; as also for a special jury, if the circumstances require it.

T. 1721, Canc.
Anon. 2 P. Wms. 68.
2 Eq. Abr. 238. pl. 12.
Vide Attorney-General v. Snow
cited.

38. Though the court will not carry contracts into execution for bargains of stock, yet in this case the plaintiff's bill was dismissed without costs, by reason that the defendant's answer was falsified in several particulars.

T. 1721, cor. Macclesfield, C.
Dorison v. Westbrook,
5 Vin. Abr. 540. pl. 22.
2 Eq. Abr. 161. pl. 3.

39. Where a plaintiff proceeds at law and in equity for the same thing, and under an order for making his election, elects to proceed at law, or neglects to make his election within the time limited, his bill is dismissed with costs:—and if he make a *special* election to proceed at law as to part, and in equity as to the other part, with respect to so much as he elects to proceed for at law, his bill in equity may be dismissed with costs.

M. 1721, cor. Jekyll, M. R.
Anon. 2 Eq. Abr. 238. pl. 14.

40. A decree *nisi* by default, was afterwards made absolute by default; the court refused to re-hear the cause, because the costs on the first decree *nisi* were not paid, for the party cannot shew cause against a decree *nisi* by default, unless he pays the costs of the hearing *nisi*.

M. 1721, cor. Macclesfield, C.
Hoyle v. Hoyle,
6 Vin. Abr. 526. pl. 17.
2 Eq. Abr. 491. pl. 3.

M. 1721, in Scacc.
Lloyd v. Mackworth, Bunb. 138.
 The reporter notes that the co-defendant's remedy for contribution can only be by bill.

M. 1723, cor. Jekyll, M. R.
Anon. 3 P. Wms. 90. n.

6 Feb. 1724, cor. M. R.
Snaps v. Fardon,
Sel. Ca. in Ch. 6.
 2 *Eq. Abr.* 238. pl. 15.

23 Feb. 1724, Dom. Proc.
Wickett & Uz. v. Roby,
 3 Bro. P. C. 16.

P. 1724, in Scacc.
Chambers v. Robinson, Bunb. 164.

18 Mar. 1725, Dom. Proc.
Pender v. Rex, 3 Bro. P. C. 178.
 6 *Vin. Abr.* 297. c. 10.

T. 1725, cor. King, C.
Turner v. Turner, 2 P. Wms. 297.
 8 *Sel. Ca. in Ch.* 49.
 1 *Stra.* 708.

2 *Eq. Abr.* 238. pl. 18.
 Upon a re-hearing, the bill in this case was dismissed without costs. 1 *Stra* 708. *Vide* *Squirrel v. Squirrel*, 17 Nov. 1791.

T. 1725, cor. King, C.
Bidulph v. Bidulph,
 2 P. Wms. 285.
 2 *Eq. Abr.* 500. pl. 28.
Vide *Webb v. Claverden*,
 2 *Atk.* 424. *Berney v. Eyre*,
 3 *Atk.* 387.

M. 1725, cor. King, C.
Wilson v. Dabbs,
Sel. Ca. in Ch. 50.
 2 *Eq. Abr.* 238. pl. 17.

41. Two defendants are sued for tithes, one makes default; the court decreed against the other with the whole costs, leaving the other to get his contribution as he could.

42. Where one that sues both at law and in equity for the same thing, on being put to make his election, chuses to proceed at law, his bill is to be dismissed with costs: so also where one makes a special election to proceed at law as to part, and in equity as to the other part: with regard to what the plaintiff elects to proceed at law, his bill is to be dismissed with costs.

43. A decree was for the plaintiff *nisi* who does not appear. M. R. looked upon it as giving up of the judgment, and dismissed the bill with costs.

44. A. on his death-bed desires his executor *not* to trouble B. for a bond debt; the executor, nevertheless, puts the bond in suit. Decreed, that he shall deliver up this bond to B. to be cancelled, and pay his costs, both at law and in equity. But the decree was reversed as to the costs.

45. When an answer is referred for scandal, and is reported scandalous, costs are so taxed as to allow damages and satisfaction for the scandal.

46. Costs do not lie against the defendant to an information in the nature of a *quo warranto*.

47. An infant by *prochein amy* brings a bill, and never stirs till after he comes of age, and the bill is dismissed; the infant is liable to pay costs, and must take his remedy over against the *prochein amy*.

At law, an infant is liable to pay costs, if the judgment be against him.

48. In a bill brought by a devisee against an heir to prove a will, the heir cross-examined the plaintiff's witnesses, and refused to release his right, yet the heir shall have his costs; otherwise, if he examines witnesses of his own.

49. A decree was had by default, and on a petition for a re-hearing, the person in possession of the decree did not attend at the re-hearing. Bill dismissed with costs as to the petitioner.

§ 1. *Allowed or refused—who liable, &c.*

50. Plaintiff in this case being entitled to a sum of money upon a certain condition, (which he neglected to perform, and which afterwards became impossible by the act of God,) he filed his bill for recovery thereof; but the court not thinking him entitled to relief, dismissed his bill, though without costs, as he might have obtained the money, if he had pleased, by performing the condition at a proper time.

51. Bill to compel a lord of a manor to admit a purchaser, according to the agreement between the parties. There being no tender of a surrender to the lord, and consequently no refusal, he was decreed his costs.

52. A witness examined upon commission, swears reflecting words; yet he ought not to pay costs, it being the commissioners' fault to take down such deposition.

53. Where the defendant will not admit a *general* right, but puts the plaintiff to the trouble and expence of proving it, he shall pay the costs of the suit.

54. Although a jury find only sixpence damages and sixpence costs, yet the party prevailing shall have his costs to be taxed.

55. *A.* as a creditor of *B.* brought his bill against the proper parties for a sale of *B.*'s estate, alleging, that he had by his will charged it with the payment of his debts. On the trial of an ejectment, a verdict was found against the will, and thereupon *A.*'s bill was dismissed with costs: but on an appeal, this decree, so far as it related to costs, was reversed.

56. Costs ought always to be allowed where the facts contested are presumed to be in the knowledge of the party that contests them.

57. In a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, in order to have the matter tried in a feigned issue, and the issue being found for the defendant on three trials, he was not only allowed the costs of all the trials at law, but also those in equity, in regard the defendant

C—O 347

H. 1726, Canc.
Powell v. Pellett,
2 *Eq. Abr.* 209. pl. 3.

H. 1726.
Sayle v. Reeves and others,
Gilb. *Eq. R.p.* 188.
2 *Eq. Abr.* 25. c. 27.

H. 1726, cor. King, C.
Anon. 2 *P. Wms.* 406.
2 *Eq. Abr.* 240. pl. 21.

4 Feb. 1726, Dom. Proc.
Trinity Corporation v. Ryas & al.
3 *Bro. P. C.* 203.
6 *Vin. Abr.* 367. Ca. 22.
2 *Eq. Abr.* 241. c. 24.

17 Feb. 1726, Dom. Proc.
Moguire v. Maddin,
3 *Bro. P. C.* 212.
c. 19. 2 *Eq. Abr.* 241. c. 26.

24 Feb. 1726, Dom. Proc.
Squire v. Perball,
3 *Bro. P. C.* 233.

4 April 1726, Canc.
Cochrane v. Blantire,
2 *Eq. Abr.* 240. pl. 23.
6 *Vin. Abr.* 267. pl. 20.

M. 1726, cor. M. R.
Metcalf v. Beckwith,
2 *P. Wms.* 376.
2 *Eq. Abr.* 240. pl. 19.

ant had no bill; and the plaintiff might have tried it at law without coming into equity.

On a bill of partition, no costs are allowed on either side, because it is for the benefit of both parties.

M. 1726, Canc.
Anon. 2 P. Wms. 387.
2 Eq. Abr. 240. pl. 20.

(a) But this practice was altered by Lord Hardwicke. *Vide* 2 Atk. 288. Per ord. cur. and post, 27 Ap. 1748.

M. 1726, cor. M. R.
Anon. Mosf. 5.
Vide Prince's ca. 5 Co. 29.

M. 1726, cor. King, C.
Cole v. Rumney,
Sel. Ca. in Ch. 62.
2 Eq. Abr. 453. pl. 6.
Bill by an administrator. Defendant demurred. Demurrer was allowed and the bill dismissed with costs, so said to be the constant course in equity. *Per tot. cur.* East. 1720. Fraser, Administrator, and Moore in Seace. Bunb. Rep. 63.

H. 1727, in Seace.
Crosley v. Shadforth, Bunb. 245.
Vide Ca. in Parl. 57. Phillips v. Bury, Skin. 514. Carth. 319. 180. *Quere*, Strong v. Dutchess of Marlborough in Seace.

27 Feb. 1727, Canc.
Lyre v. Parnell,
2 Eq. Abr. 241. pl. 27.
6 Vin. Abr. 267. pl. 23.

T. 1728, Canc.
Haistwell v. Grainger,
3 Eq. Abr. 351. pl. 7.

M. 1728, cor. King, C.
Coppin v. ———,
2 P. Wms. 496.
Vide Bond v. Simmons, 3 Atk. 21. Anon. 3 Atk. 726.

M. 1728, cor. M. R.
Brace v. Dutchess of Marlborough,
Mosf. 50.

58. Where the cause is brought on only on a bill and answer, if the bill is dismissed against any of the defendants, there only 40 s. costs are to be paid: but if the plaintiff has a decree against the defendants, though only on bill and answer, in such case costs must be taxed (a).

59. If an infant sues for a legacy, costs must be paid out of assets, not out of the legacy.

60. An executor brought a very frivolous bill, which was dismissed with costs out of the assets; the executor was ordered to be examined on interrogatories if he denies assets, and so it was done in another cause the next day.

61. Costs are not given in the Exchequer after an appeal to the House of Lords.

62. Plaintiff always pays costs where an account turns against him, or where he prevails in nothing but what he might have insisted on at law.

63. If a process for contempt issues for want of an answer, and plaintiff *accepts the costs* of the contempts, they are purged; and if an insufficient answer is put in by defendant, plaintiff must begin his process *de novo*; but if he *refuses the costs*, and upon exceptions to the answer defendant is obliged to put in a further answer, plaintiff may go on with the process where he left off.

64. Baron and feme bring a bill to redeem a mortgage; the defendants plead to the bill, and the plea being over-ruled, 5 l. costs are given to the plaintiff: baron dies, the feme by survivorship shall have the costs.

65. On a bill by creditors, if the lands by consent are decreed to be sold, and the creditors to be paid

§ 1. *Allowed or refused—who liable, &c.*

C—o 349

paid according to their priority, the costs notwithstanding shall be paid in the first place to all the creditors.

66. Issues being directed to be tried at bar, the court refused to make it part of the order, that the defendant should pay only *nisi prius* costs, if they were found against him.

H. 1729, cor. King, C.
Lord Falmouth v. Innes,
Mos. 93.

67. On report of assets, costs were decreed generally against the defendant, and not out of assets.

M. 1729, cor. King, C.
Davy v. Sney, Mos. 204.
Vide Cro. Jac. 229. *Yelv.* 169.

68. The defendant may amend his bill, paying common costs, after the demurrer is put in, but after it is set down to be argued, costs of the demurrer must be paid upon amendment.

H. 1730, cor. M. R.
Ann. Mos. 301.

69. The defendant, who was decreed to pay costs, being run away, and the *prochein amy* poor, the solicitor was paid his bill of costs out of money lodged in court, for the benefit of the plaintiffs, during their infancy.

P. 1730, cor. King, C.
Staines v. Maddox, Mos. 319.

70. Where the suitor has paid the officer his fee, and he neglects his duty (a), by which the suitor's process becomes irregular, the suitor is to pay the costs to the other side, but shall recover them again from the officer.

M. 1731, cor. King, C.
James v. Philips, 2 P. Wms. 657.
2 Eq. Abr. 241. pl. 28.
(a) This was a case where a registrar after receiving his fees had neglected to enter the plaintiff's attachments, on which account plaintiff was reported guilty of irregularity.

71. One defendant, who was never served with process, voluntarily appeared and answered; he was allowed his costs on amending the bill, by striking out his name.

H. 1733, in Scacc.
Blackett v. Middleton, Bunb. 335.

72. Bill for thirteen sorts of tithes, and the plaintiff proved but one species due, and did not abridge his demand by his replication, yet the court decreed him costs generally.

H. 1733, in Scacc.
Smith v. Morgan, Bunb. 335.

73. One ought not to be condemned to pay costs in this court for insisting on a right which the law gives him.

M. 1733, cor. King, C.
Brown & Ux. v. Elton,
3 P. Wms. 205.
2 Eq. Abr. 241. pl. 29.

74. Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, who by his will occasioned the difficulty.

T. 1734, cor. Talbot, C.
Stadhols v. Hodgson & al.
3 P. Wms. 303.
Vide Staines v. Maddox, 2 P. Wms. 421.

75. Where

P. 1735, cor. Talbot, C.
Mallabar v. Mallabar,
 Cs. temp. Talb. 79.
 2 *Eq. Abr.* 234. pl. 22.

T. 1735, cor. Talbot, C.
Tourton and another v. Flower
 & al. 3 P. Wms. 371.
 2 *Eq. Abr.* 78. pl. 9.

Note; What is said in 1 Vern.
 78. *Durant v. Redman*, that costs
 ought to be paid for a new demurrer, insisted on at the bar *ore tenus*, is not now the practice.

T. 1735, cor. Talbot, C.
Luxton v. Stephens,
 3 P. Wms. 373.
 2 *Eq. Abr.* 241. pl. 31.

H. 1736, cor. Hardw. C.
Sumner v. Thorpe, 2 Atk. 1.

28 Jan. 1737, cor. Hardw. C.
Clifton v. Orchard, 1 Atk. 610.
Vide Anon. 2 Atk. 14.

7 June 1737, Dom. Proc.
Griffith v. Lewis,
 4 Bro. P. C. 314.

M. 1737, cor. Hardw. C.
Anon. 2 Atk. 14.

(a) *Vide Clifton v. Orchard*,
 1 Atk. 610.

21 Jan. 1738, cor. Hardw. C.
Woodcock v. King, 1 Atk. 286.
Vide Walmsley v. Child, 1 Ves.
 344.

19 Feb. 1738, cor. Hardw. C.
Deggs v. Colebrooke, 1 Atk. 396.

75. Where the assets of a testator (exclusive of his copyhold estates) are more than sufficient to pay his debts, and it is so confessed by answer, the court will not supply a defective surrender to the prejudice of the heir, but will dismiss, with costs, a bill brought for such purpose.

76. If one demurs to a bill and that demurrer be ill, the defendant may shew a fresh cause of demurrer at the bar *ore tenus*, and if that be good the defendant cannot have his costs.

77. An heir at law is made a defendant and insists on his title; he shall have his costs though it goes against him: but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs; for on his suit appearing to be groundless he shall pay costs.

78. When there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend; but pays only the costs of the day.

79. Issues were directed by this court to try a modus, which was established by two verdicts; yet held that the plaintiff is entitled to his costs at law only, and not in equity.

80. On a decree for tythes, the Master reported only 9s. due to the plaintiff; yet held he was entitled to his costs.

81. In this case there had been no demand, or rent paid for 30 years; yet as it was recovered by a verdict, the plaintiff was held entitled to his costs at law; but as the laches arose on his part, and the obscurity of the title to the rent, from the want of a demand for such a length of time; held he should not have costs in equity (a).

82. The court will not, on motion, dismiss a bill brought merely for discovery, for want of prosecution; but defendant must pray an order on the plaintiff to pay taxed costs.

83. Upon payment of 20s. costs a bill may be amended after answer put in, by the constant rule of the court; but Lord Chancellor said he would consider

§ 1. *Allowed or refused—who liable, &c.*

C—O 351

consider how to make a more adequate compensation to a defendant for the future, after a long answer and other necessary proceedings had on the part of the defendant (a).

not pay taxed costs, but only 40 s. unless it be a case of particular oppression. *Maister v. Lyndon*, 1 Bro. Ch. Ca. 291.

(a) Though a plaintiff amends his bill several times, yet he shall

84. Where a wife is a defendant, and a charge of fraud is solely confined to her, there is no precedent of the husband being decreed to pay costs.

T. 1738, cor. Hardw. C.
Coston v. Luttrell, 1 Atk. 451.

85. Upon a bill filed by parishioners against the vicar to establish a *modus* for particular tythes, the plaintiffs will be ordered to pay costs for such part of their demands as the defendant did not offer to controvert.

M. 1738, Canc.
Smithson & al. v. Dodson,
9 Mod. 118.

86. A *purchaser pendente lite*, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit, though the controversy may have existed for 20 years; for he comes into court *pro bono et malo*.

30 Nov. 1759, cor. M. R.
Anon. 1 Atk. 88, 89. 571.

87. Costs in equity are entirely in the discretion of the court; but where the court think it will accelerate the decree, they will postpone the consideration of costs till the cause comes back from the Master, though there are sufficient grounds for decreeing them at the hearing.

14 Jan. 1740, cor. Hardw. C.
Scarborough v. Burton,
2 Atk. 111. *Barnard* d. 255.

A plaintiff may apply to the court for costs, where a defendant gives unnecessary trouble in carrying a decree into execution.

88. In equity, as well as at law, costs follow the justice of the demand.

15 Jan. 1740, cor. Hardw. C.
Roberts v. Kiffin,
2 Atk. 113. *Barnard* d. 259.

89. Where three or four orders are obtained for the amendment of a bill, and new ingrossments are made under those orders, the rule is, if the plaintiff moves for *further* liberty to amend his bill, he shall pay full costs to be taxed.

H. 1740, Canc.
Anon. 2 Eq. Abr. 60. pl. 7.
Barnard. Eq. Rep. 332. S. C.
nomine Brindal v. Sir John Thompson, states it, That plaintiff had obtained three several orders to amend his bill on payment of

20 l. costs, and under these orders had amended accordingly. Then he moved for a fourth order to amend upon the like terms, when it was insisted he ought to pay full costs. But the court inclining to allow of the amendments, the defendant consented to it upon plaintiff's agreeing to waive the exceptions which he had taken to the answer. Hereupon plaintiff amended his bill, by adding a new ingrossment of fifteen sheets; and it was now moved that this last order might be discharged, or else that the plaintiff might pay full costs for the amendment. But Lord Chancellor observed, that at the time the last order was made the motion was defended, and there was a *consent*; for which reason his lordship would not discharge the fourth order, or require that full costs should be paid.

90. A. by bill, prayed relief and a discovery against B., and proceeded against him at law on the

H. 1740, cor. Hardw. C.
Gurish v. Donovan,
Barn. Rep. in Ch. 418.

2 Atk. 266.
2 Eq. Abr. 12. pl. 19.

the same account; *B.* prayed that *A.* might elect in which court he would proceed; *A.* elected to proceed at law, but had leave to proceed in equity so far as he sought a discovery; *A.* amended his bill on payment of costs, and struck out his prayer for relief; his bill was thereupon dismissed of course, because it only prayed a discovery, and *B.*'s costs were taxed at 38*l.* *A.* got a judgment at law for 440*l.* and took *B.* in execution, and *B.* took out an attachment against *A.* for the 38*l.* *A.* petitioned that he might deduct the 38*l.* out of the 440*l.* Lord Chancellor seemed inclined to grant it, if any precedent could be found; and directed it to stand over, that plaintiff might search for precedents.

12 Feb. 1740, cor. Hardw. C.
Aven. 2 Atk. 123.

91. After a third order to amend a bill, plaintiff shall not be allowed so to do but upon payment of taxed costs to the defendant.

12 Mar. 1740, cor. Hardw. C.
Wilkins & Ux. v. Hunt,
2 Atk. 151.

92. It is by no means an invariable rule that an administrator should be allowed costs at all events.

Vide Hide v. Heywood, 2 Atk. 126.

P. 1740, cor. Parker, J. abf. C.
Franklyn v. Fyn,
Barnard. 30.
2 Eq. Abr. 593. pl. 10.

93. In this case an assignment of a lease was made absolute, which it appeared in evidence was intended only by the assignor to be by way of mortgage. Upon a bill brought for a redemption it was contended, that the assignee of the lease had not only forfeited his costs, by insisting on the assignment as absolute, but that he ought to pay the costs of the suit to the plaintiff. *Per Curiam*, It would be going too far to make the assignee pay the costs of the suit; but he certainly has forfeited his own costs.

30 April 1740, cor. Hardw. C.
Ex parte Goodwin, 1 Atk. 101.

94. A petitioning creditor shall pay costs of supersedeas only where a commission is superseded for a defect in form, and no doubt of the act of bankruptcy; otherwise if the act of bankruptcy had not been fully proved.

10 Nov. 1740, cor. M. R.
Sandys v. Watson, 2 Atk. 80.
Vide Humphrey v. Moore,
2 Atk. 108.

95. Where the estates of two testators have been so blended as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's costs as well as the defendant.

20 Dec. 1740, cor. M. R.
Sutton v. Stone & al.
2 Atk. 101.

96. Where there is no replication to defendant's answer, he is only entitled to costs according to the

the course of the court; but where, as in this case, though the plaintiff did not reply to the answer of a lord of a manor, yet as he desired an act to be done, viz. to be admitted to the copyhold estate, he must pay the lord's costs (a) to be taxed.

(a) *Vide Newham v. Gray*, 2 Atk. 286.

97. Where a plaintiff, on a bill to perpetuate the testimony of witnesses, has examined, and thereby had the fruit of her bill, neither herself nor the defendant are entitled to costs.

18 April 1741, cor. Hardw. C. *Lady Coddington v. England*, Barn. 436. 2 Atk. 167. 2 Eq. Abr. 241. pl. 32.

98. Where the court did not think the answer full enough, and directed an issue upon the merits, this is not hearing a cause upon bill and answer only, but a subsequent proceeding, and therefore is out of the rule of dismissal with 40s. costs (a).

2 April 1742, cor. Hardw. C. *Newham v. Gray*, 2 Atk. 286.

Where a plaintiff, merely to keep his cause alive, replies, and afterwards withdraws his replication, and sets it down on bill and answer only, that it may be dismissed with 40s. costs; this is evading the justice of the court, for otherwise he must have paid the full costs to be taxed by a Master.

(a) *Vide Sutton v. Stone*, 2 Atk. 101, S. P.

Lord Chancellor in this case inclined to alter the course of the court with regard to 40s. costs only in cases of dismissal upon bill and answer, and therefore dismissed the present bill, with costs to be taxed (b) as appears by *Reg. lib. B. 1741, fr. 190*.

(b) *Vide also Johnson v. Brown*, 3 Atk. 1. *Mansel v. Bowles*, Bro. Ch. Ca. 403.

99. The court cannot, upon petition, make the clerk of the commission pay costs of suit for not attending to give evidence at a trial, by reason of which the bankrupt was acquitted, for the remedy lies at law.

27 June 1742, cor. Hardw. C. *Ex parte Holliday*, 1 Atk. 209.

100. Arbitrators may plead their award in bar to a bill charging partiality; but they must support their plea by shewing themselves impartial, or the court will give a party a remedy by making them pay costs.

6 Aug. 1742, cor. Hardw. C. *Lingood v. Croucher*, 2 Atk. 395. *Vide John Ward's case*.

101. The giving of costs in equity is entirely discretionary (a), and not at all conformable to the rule at law; in equity costs are given to the time of the decree, but at law *unica directio fiat damnorum*; and therefore they do not from time to time direct costs, but wait till there is a final judgment.

12 Aug. 1742, cor. Hardw. C. *Jones v. Coxeter*, 2 Atk. 400.

(a) *Vide Scarborough v. Burton*, 2 Atk. 111. *Burford Corporation v. Lenthall*, 2 Atk. 552. *Bennet College v. Casey*, 3 Bro. Ch. Ca. 390. S. P. The awarding of costs is a matter discretionary in the court, and its power herein is always exercised according to the circumstances of the case and the litigiousness of

In the present case it was suggested, that the poverty of the plaintiff would not allow her to carry on the cause, unless the court would direct

either of the parties. If the court cannot relieve against a forfeiture the bill will be dismissed without costs. Frequently each party is to bear his own costs. The expense either party is put to by the delays, contempt, &c. of the other are only remitted or purged by the payment of costs, unless the court order otherwise. Executors, guardians, and trustees are usually exempted from costs, or are awarded costs out of the estate in their hands, unless they have greatly misbehaved themselves; also an heir at law in most cases is exempted from paying costs. *Vide 1 Eq. Abr. 125. n. to pl. 1.*

the defendant to pay her something in the meantime; wherefore Lord Chancellor directed the Master to tax the costs decreed to the plaintiff, and the defendant to pay them, to empower her to go on with her suit.

15 Oct. 1742, cor. Hardw. C.
Humphrey v. Morse, 2 Atk. 408.
(a) *Vide Bidulph v. Bidulph*,
2 P. Wms. 285. *Luxton v.*
Stephens, 3 P. Wms. 373. *Webb*
v. Clavering, 2 Atk. 424. *Ber-*
ney v. Eyre, 3 Atk. 387. *Blower*
v. Morrey, 3 Atk. 772.
(b) *Vide 1 Eq. Abr. 125. (n. 2.)* *Humphrey v. Moore*, 2 Atk. 108. *Uvedale v. Uvedale*,
3 Atk. 119.

102. An heir is entitled to his costs; for it is the law which casts the descent upon him (a); otherwise as to an executor, because he may renounce (b).

29 Oct. 1742, cor. Hardw. C.
Webb v. Clavering, 2 Atk. 424.

103. When an heir at law brings a bill to set aside a will for insanity instead of an ejectment, he shall pay costs if he fails.

When an heir is brought before the court as a defendant, and an issue at law is directed to try the fraud or insanity of the testator, though he fails in overturning the will, the court will not give costs against him, but very often allows the heir his costs (a).

(a) *Vide Bidulph v. Bidulph*,
2 P. Wms. 285. *Humphrey v.*
Morse, 2 Atk. 408. *Berney v. Eyre*, 3 Atk. 387.

9 May 1743, cor. Hardw. C.
Burford Corporation v. Leppell
& al. 2 Atk. 551.
Vide Aylett v. Dod, 2 Atk.
238.

104. Exceptants to a decree of charitable uses were allowed costs on those exceptions where they prevailed, and on those where they did not, the respondents were intitled to costs.

As to the point of costs in this case it was said, the court ought to resort back to the original jurisdiction, upon arguments chiefly drawn from cases of costs at law and the old acts, the statute of *Marlebridge*, 52 H. 3. &c. But courts of equity have in all cases done it, not from any authority but from conscience *et arbitrio boni viri*, as to the satisfaction on one side or other on account of vexation.

* *Vide Jones v. Coxeter*,
2 Atk. 400.

16 May 1743, cor. Hardw. C.
Kailien v. Dodomade,
2 Atk. 592.

105. Though a demurrer to a person's being examined as a witness was over-ruled, a *subpoena* cannot be taken out against him for costs, yet the court will give them upon an application by motion.

106. On

§ 1. *Allowed or refused—who liable, &c.*

C-DO 335

106. On a bill brought for a specific legacy, costs were decreed out of the other part of testator's personal estate, that the legacy may be entire.

18 Oct. 1743, cor. Hardw. C.
Reghew v. Newton, 9 Mod. 683.

107. Where the defendants denied the equity of a bill, and the plaintiff brought the cause to a hearing on a bill and answer only, in order to get off with 40s. costs, the court on dismissing the bill upon the merits, gave costs to be taxed.

7 Nov. 1743, cor. Hardw. C.
Johnson v. Brown, 3 Atk. 4.
Vide *Newham v. Gray*, 2 Atk. 288. and the cases there referred to.

108. The Master, to whom it was referred, reported the proceedings under a commission for examination of witnesses, irregular; upon exceptions, the court thought them regular, and allowed the exceptions; and the party who succeeded had his costs of the application. Lord Hardwick discharged the order for costs, because the plaintiff's was not a vexatious proceeding, but in the Master's opinion well founded; and the rule is never to give costs but where no just ground appears for the proceeding.

T. 1744, cor. Hardw. C.
Allen, 3 Atk. 235.

Exceptions to an answer for insufficiency, and so reported. Upon exceptions, the court held it to be sufficient, yet the party succeeding in the application was not entitled to his costs; but held, they should wait the event of the cause.

On a special motion, and stating particular circumstances, the court may give costs, though the Master reports in favour of the other party.

109. Where a debt of a testator is recovered against an executor at law, costs are given *de bonis propriis*; but in equity, it is discretionary whether the court will make him pay costs or not.

20 July 1744, cor. Hardw. C.
Uordale v. Uordale, 3 Atk. 119.
Vide *Humphrey v. Morfe*, 2 Atk. 408. *Humphreys v. Moore*, 2 Atk. 108.

110. Where a devisee brings a bill merely *in perpetuum rei memoriam*, and the heir at law only cross-examines the witnesses, he is entitled to his costs (a); but if to encounter the will, he shall not have his costs.

22 July 1746, cor. Hardw. C.
Berney v. Eyre, 3 Atk. 387.

(a) Vide *Bidolph v. Bidolph*, 2 P. Wms. 285.

As an heir has a right to be satisfied how he is disinherited, he shall have his costs, though he has an issue directed to try the will, and it is established.

But if the heir sets up insanity, or any other disability against the person who made the will, and fails, he shall not have his costs (b).

(b) Vide *Webb v. Cleverden*, 2 Atk. 424.

In a case of spoliation or secreting a will, the court will give costs against an heir.

1 Aug. 1747, cor. Hardw. C.
Forward v. Duffield, 3 Atk. 555.

111. If an obligee will put in a bad answer, and insist upon more than is really due, he shall lose his costs in equity, though he is entitled to them at law.

M. 1747, cor. Hardw. C.
Pott & al. v. Reynolds & al.
3 Atk. 565.

112. The court will not give leave to withdraw a replication, unless something further is added, as that the plaintiff may be thereby enabled to amend his bill, or some other sufficient reason, for otherwise it may be a contrivance to defeat the defendant of his full costs, by getting the bill dismissed at the hearing, with 40s. costs.

M. 1747, cor. Hardw. C.
Attorney-General v. Parker & al.
3 Atk. 579.

113. Lord *Hardwicke* now mentioning the above case of *Pott v. Reynolds*, gave general directions to the Register to frame an order, which might prevent future applications to the court to withdraw the plaintiff's replication, with a view to set down the cause on bill and answer only, and by that means get the bill dismissed with costs, according to the course of the court, whereas otherwise plaintiff must have paid defendant his full costs.

21 Nov. 1747, cor. Hardw. C.
Harding v. Cox, 3 Atk. 583.

114. Plaintiff obtained an order to amend his bill, by a false suggestion that the cause was at issue only, when it was in the paper for hearing. The order was discharged, and the cause put off till the next term, on paying the costs of the day, that the plaintiff might have an opportunity of amending his bill.

H. 1748, in Scacc.
Attorney-General v. Munn,
Parker 91.

115. The Attorney-General, as well as the officer, is entitled to costs by the act 8 Ann. c. 7. where there is judgment for the king in an information on a seizure.

27 April 1748, per Hardw. C.
Ordo Curiae.
2 Atk. 288.

116. In regard to dismissing bills where the cause is set down on bill and answer only, or where it is so set down after withdrawing a replication, whereby plaintiffs are encouraged to bring frivolous and vexatious bills, and whereby defendants (according to the course of the court) receive only 40s. costs; ordered, that to discourage such practice in future, where any cause shall be brought to a hearing upon bill and answer, and such bill shall be dismissed, the court may direct such dismissal to be either with 40s. costs; or with costs to be taxed by a Master, or without costs, as the court upon the nature and merits of the case shall think fit.

Note; Lord *Hardwicke* seems to have had this order of court some time in contemplation, for in April 1742, case *Newsham v. Gray*, 2 Atk. 286. he expressed his desire to alter the course of the court with regard to 40s. costs in cases of dismissal upon bill and answer only; and in that particular case his lordship dismissed the bill with costs to be taxed.—See in *Johnson v. Brown*, 3 Atk. 1. a like decree of dismissal was made. See, *Pott v. Reynolds*, 3 Atk. 565. where *Ld. Hardwicke* refused plaintiff leave to withdraw his replication, unless for some very sufficient reason; and in *Attorney-General v. Parker*, 3 Atk. 579. M. 1747, *Ld. Hardwicke* ordered the register to frame

frame an order which might prevent future applications to withdraw the plaintiff's replication, with a view to set down the cause on bill and answer only, and thereby get the bill dismissed with 40s. costs. —*Vide etiam*, *Manfel v. Bowles*, 1 Bro. Ch. Ca. 403. Motion to vary a decree by reducing the costs to 40s. according to the course of the court, the cause being heard upon bill and answer, Mr. Solicitor General against the motion cited the above order of Lord Hardwicke, by which, he said, the practice was altered. Lord Chancellor granted the motion, saying, the order of Lord Hardwicke did not alter the practice generally, but gave a discretion to vary it if a special case was made for it:—*Vide Bayly v. Leominster Corporation*, 1 Ves. jun. 476.

117. Where a solicitor carries on suits for an assignee, without the authority of the majority in value of the creditors, the solicitor has his personal remedy against the assignee, but the estate of the bankrupt is not liable to his bill for such suits.

7 June 1749, cor. Hardw. C.
Ex parte Whitechurch and others,
1 Atk. 210.
Vide 5 G. 2. c. 30, s. 38.

118. Plaintiff had given defendant's wife a bond for money, as a reward for undue influence used by her over a weak old man in the disposal of his property. Bill to have this bond delivered up, dismissed, but without costs, plaintiff being *particeps criminis*.

7 July 1749, cor. Hardw. C.
Debenham v. Ox, 1 Ves. 276.

119. There are several cases of mortgages in which, though very reasonable proposals have been made, yet where there is no proof of an actual tender, the court on a bill to foreclose never refuses costs.

7 Dec. 1749, cor. Hardw. C.
Gammon v. Stone, 1 Ves. 339.

120. Petition by O. to be discharged from a contempt, and out of custody, for non-payment of costs taxed, for scandal and impertinence against F. L., who had executed a release to O., which release, it was insisted, should bind B. the clerk in court, who carried on the prosecution against the petitioner. *Per* Lord Chancellor—The clerk in court has a general lien on the duty recovered by his diligence and expence, which extends as well to collateral proceedings as to a decree. But it is objected, that the client has released it to his adversary, and that that binds his solicitor and clerk in court, who although they have originally a lien on what has been recovered by their expence, diligence, and costs, yet that is not to extend so far as to prevent the client from fairly and honestly making an end with his adversary. Lord Chancellor thought so, *provided any thing appeared to be paid*. If the client had by composition or any reasonable consideration for the costs, made an end with his adversary, he should not be said suffer this equity to be set up; but if a clerk in court, having this equity, shall be discharged by a mere voluntary

22 Oct. 1750, cor. Hardw. C.
Anon. 2 Ves. 25.

tary release executed by his client and his adversary, he might be defeated by a collusion. This is the distinction; the costs are not paid; no composition or consideration; but a mere voluntary release set up to defeat the clerk in court, which might be done in any case if the court should suffer this. Had there been any consideration, his lordship would have laid weight thereon; but no such appeared in evidence. As to this contempt, therefore, and the attachment thereon, let the petitioner be discharged on payment to *B.*, it appearing that *F. L.* had executed a release.

M. 1750, cor. *Hardw. C.*
Davis v. Chapman,
1 *Ves.* 542. 2 *Ves.* 100.

*120. An order made by Baron *Clarke* for allowing a demurrer was now reversed, but defendant having immediately levied 5 *l.* the costs of allowing it, it was prayed, that in drawing up the order of reversal, it should be with costs to be returned to the plaintiff. Lord Chancellor thought it reasonable that the costs should be refunded, the case being the same as if the demurrer was disallowed originally. The Register being consulted knew of no precedent, nor could any one be found, wherefore his lordship made one, by decreeing the 5 *l.* to be refunded, agreeable to the general rule of law, and to the practice of all other courts, either on reversal of a decree, or of a judgment on a writ of error.

8 Mar 1751, cor. *Hardw. C.*
Dixon v. Parker, 2 *Ves.* 223.

121. Lord *Hardwicke* took it for granted, though he did not know it was strictly the case, that a party cannot come into court and pray for a decree for costs only, where no decree can be had by him upon the merits.

18 May 1751, in Scacc.
Taylor v. Rochfort, 2 *Ves.* 284.
Vide Coton v. Lutterel, cited in *Dixon v. Parker,* 2 *Ves.* 219.

122. None can be made defendant, only to pray costs against him.

21 June 1751, cor. *Hardw. C.*
Chicot v. Lequeyne, 2 *Ves.* 315.

123. An arbitrator will render himself liable to costs by an improper declaration.

27 May 1752, cor. *Hardw. C.*
Ex parte Thomas, *Ambl.* 146.
Note; This order was made upon the authority of a cited case, *Ex parte Whitfield*, but the practice was said to be first introduced by Sir Joseph Jekyll.

124. The court in this case ordered the costs of a reference, respecting an infant's maintenance, upon petition and without suit.

27 Jan. 1753, cor. *Hardw. C.*
Leman v. Aile, 1 *Eq. Abr.* 123.
Ambl. 163.
Vide Shales v. Barrington, 1 *P. Wms.* 481.

125. Plaintiff who was disinherited brought his bill to have inspection of deeds and writings, and there appearing to be no title in plaintiff, defendant

ant moved that the bill should be dismissed with costs. *Per Lord Chancellor*—Where an heir at law brings a bill for a discovery, there is no pretence that he shall pay costs. Bill dismissed without costs, but with liberty for defendant to apply for costs if plaintiff should molest him.

126. An issue had been directed to try the bankruptcy of G., and found no bankrupt, agreeable to the judge's directions. G. therefore petitioned to supersede the commission, and that the petitioning creditor might pay the costs in equity as well as at law. *Per cur.*—A commission of bankruptcy is a proceeding at law in the first instance, and if costs are given there, it will follow of course in the proceedings before this court, as consequential. The commission was superseded, and costs therefore given to the bankrupt both at law and in equity against the petitioning creditor.

3 Feb. 1753, cor. Hardw. C.
Ex parte Gifford, 1 *Ath.* 139.

127. Costs accrued by protesting bills before a commission issues may be proved, but no part of the costs arisen afterwards (a).

10 Aug. 1754, cor. Hardw. C.
Anon. 1 *Ath.* 140.
(a) See *Ex parte Moore*, 2 Bro. Ch. Ca. 597.

128. It was held in this case, that a library of books did not pass by a devise of "all the household furniture in testator's house at the time of his death." The residuary legatee brought a bill for the books, but the court would not allow him his costs out of the estate, though strongly urged by the bar.

19 May 1763, cor. M. R.
Sir Geo. Kelly v. Proulet,
Ambl. 605. 1 *Eq. Abr.* 123.

129. If a bill be referred as scandalous and impertinent, and be so reported, and exceptions to the report are taken and allowed, plaintiff shall have the costs of the reference, but not in the like event of a reference for irregularity.

1 Aug. 1764, cor. Northingt C.
Bromfield v. Cbichester,
Ambl. 464, 5, 6.
1 *Eq. Abr.* 126.

130. Bill retained for 12 months, with liberty for plaintiff to bring his action at law. Plaintiff neglected to bring his action within the time limited by the decree, and the court dismissed his bill with costs. Decree affirmed.

14 Dec. 1767, Dom. Proc.
O'Grady Esq. v. Lord Kinsale,
6 Bro. P. C. 284.

131. On an assignment of dower by commission the dowress shall have no costs, unless previous questions are raised, in litigating which the party is vexatious.

P. 1782, cor. Thurlow, C.
Lucas v. Calcraft,
1 Bro. Ch. Ca. 134.
1 *Eq. Abr.* 126.

P. 1783, cor. Lds. Comrs.
Fidelle v. Evans,
 1 Bro. Ch. Ca. 267.
 1 Eq. Abr. 126.
Vide Knox v. Brown, 2 Bro.
 Ch. Ca. 186.

M. 1784, cor. Thurlow C.
Mansel v. Bewles,
 1 Bro. Ch. Ca. 403.
 1 Eq. Abr. 126.
Vide Newtham v. Gray, 2 Atk.
 288. *Johnson v. Brown*, 3 Atk. 1.

H. 1785, cor. Thurlow, C.
Blackbourn and another, Assignees,
v. Gregson and another, As-
signees,
 1 Bro. Ch. Ca. 420.
 1 Eq. Abr. 125.

22 Feb. 1787, cor. Thurlow, C.
Aldrich v. Thompson,
 2 Bro. Ch. Ca. 149.

H. 1788, cor. Thurlow, C.
Earl of Massarene v. Lyndon,
 2 Bro. Ch. Ca. 291.

P. 1789, cor. Thurlow, C.
Ex parte Moore,
 2 Bro. Ch. Ca. 597.

M. 1789, cor. Thurlow, C.
Jessie v. East and others,
 3 Bro. Ch. Ca. 25.

M. 1789, cor. Thurlow, C.
Colman v. Sarrel,
 3 Bro. Ch. Ca. 32.
 1 Ves. jun. 55.

M. 1789, cor. Thurlow, C.
Guate against Fryer,
 3 Bro. Ch. Ca. 23.

132. A motion to dismiss a bill without costs cannot be made, but upon consent at the bar; but in this case the court gave a rule to dismiss *my causa*, there being an agreement in writing between the parties.

133. Plaintiff having brought a vexatious suit set down the cause on bill and answer, and would not reply for fear of the costs. Lord Chancellor would not hold himself bound by the rule of 40 s. costs; but dismissed the bill with costs, to be taxed by reason of the vexation.

134. When the material issue has been found for the party setting down the clause for further directions, he shall have the costs of the trial at law.

135. Bill of interpleader by the tenants of Lord J. against several sets of annuitants who had dis-trained on their farms. The rents were paid into court, and the only question as to the plaintiffs was the costs. Decreed to the tenants their costs out of the rents in court.

136. Plaintiff amends his bill several times. He shall not pay taxed costs, but 20 s. only; and this is the general rule.

137. Costs arising from the protest of bills shall be proved under a commission of bankruptcy only when incurred antecedent to the act of bankruptcy, (where the date of such act is ascertained,) and not to the issuing of the commission.

138. Where a testator expresses himself so ambiguously as to make a suit in equity necessary, the costs shall be paid out of his general assets.

139. No costs can be given to a party claiming under a contract not meritorious, even though recovered upon, and even though he were a trustee.

140. Where there is a bill filed against an administrator, and a decree *quod computet*, and that creditors shall come in, if a creditor brings an action, an injunction shall issue to stay trial as well as execution; but if the action be brought before the bill filed, and he chuses to discontinue, he shall be

§ 1. *Allowed or refused—who liable, &c.*

C—o 361

be allowed to prove his costs at law in addition to his debt.

141. Where a tenant for life, impeachable, &c. had cut no more timber than what was charged by the bill and admitted by the answer, the produce shall be paid over without costs.

15 Dec. 1789, cor. Thurlow, C.
Lee v. Alston, 3 Bro. Ch. Ca. 38.

142. Where an executor keeps the money of his testator longer in his hands than the exigencies of the testator's affairs require, he shall pay interest; but one executor shall not be answerable for the money come to the hands of another, unless they have joined in receipts or done other joint acts; but each shall be liable to the whole costs.

14 Mar. 1790, cor. Thurlow, C.
Littlehales v. Gascoyne,
3 Bro. Ch. Ca. 73.

143. A motion was made in a pauper cause on the part of plaintiff to dismiss the bill against two defendants without costs. But Lord Chancellor ordered it to be *upon payment of costs*.

T. 1790, cor. Thurlow, C.
Pearson v. Beckler,
3 Bro. Ch. Ca. 87.

144. An executor, who ought to have been a co-plaintiff was made a defendant; Lord Chancellor doubted for some time whether he was entitled to his costs; but at length ordered them to be paid to him.

T. 1790, cor. Thurlow, C.
Blount v. Burrow,
3 Bro. Ch. Ca. 90.

145. Where costs are given; and the fund is in court, ordered that it shall remain till the account, and then the costs to come out of the balance, if any due to the party, as far as it will go.

T. 1790, cor. Thurlow, C.
Crooke v. Ballard,
1 Ves. jun. 221.
3 Bro. Ch. Ca. 120.

146. A bill being amended after answer, plaintiff must pay costs, for then it is considered as an original bill.

T. 1790, cor. Thurlow, C.
Lord Abingdon v. Butler and another, 1 Ves. jun. 210.

147. Where trustees and executors make a claim and fail, they shall have their costs if they are brought into court and submit themselves; but no costs shall be given either for or against an heir at law who raises a point and fails.

2 July 1790, cor. Thurlow, C.
Rasbley v. Masters,
1 Ves. jun. 205.
3 Bro. Ch. Ca. 99.

148. Costs were given of course out of the fund in this case, to those agents, receivers, and trustees who had accounted fairly and paid money into court.

M. 1790, cor. Thurlow, C.
Attorney-General v. College of William & Mary in Virginia,
1 Ves. jun. 246.

But costs cannot be given to a college individually, nor as a corporation, unless proved to be so.

Vide post, pl. 151, S. C.

149. On an information for a charity the re-lator appearing to have no title, there can be no decree

M. 1790, cor. Thurlow, C.
Attorney-General v. Oglander,
1 Ves. jun. 246.

When an information only concerns the rights of the crown, the relator is *sometimes* named; but when it concerns those whose rights the crown takes under its particular protection, there is *always* a relator who in reality sustains and directs the suit. *Mist. 96.*

M. 1790, cor. Thurlow, C.
Baugh v. Reed,
3 *Bro. Ch. Ca.* 192.

150. This was the common case of a legatee bringing a bill for a legacy, and the difficulty having arisen from the ambiguity of the testator's meaning, the costs were decreed to be paid out of the fund.

M. 1790, cor. Thurlow, C.
Attorney-General at the Relation of the Bishop of London v. City of London—Case of the Hon. Robert Boyle's Charity,
3 *Bro. Ch. Ca.* 171.
1 *Ves. jun.* 243.

151. In an information on behalf of a charity, the court gave costs to all the agents, receivers, and trustees, who had acted fairly, but refused costs to a corporation which was not proved to be so.

T. 1791, cor. Thurlow, C.
Pitt v. Mackreth,
3 *Bro. Ch. Ca.* 321.

152. Exceptions to a Master's report are not to be taken for costs only. The regular way is to state the articles the party means to object to by way of petition, and pray leave to except.

T. 1791, cor. Thurlow, C.
Dowson v. Hardcastle,
1 *Ves. jun.* 369.

153. Plaintiffs in a bill of interpleader are entitled to their costs, but there is no instance of costs being given to a defendant. In the present case Lord Chancellor would have given defendants their costs if he could have found a precedent.

M. 1791, cor. Thurlow, C.
Bennet Col. v. Cassey,
3 *Bro. Ch. Ca.* 390.

154. Bill for a specific performance of a contract. Defendant could not make a title. The bill was dismissed, and Lord Chancellor proposed dismissing it with costs; but it was objected that the costs ought to follow the event of the suit. *Sed per* Lord Chancellor—The costs are completely in the discretion of the court.

M. 1791, cor. Thurlow, C.
Dixon v. Parks, 1 *Ves. jun.* 402.

155. Plaintiff can in no case dismiss his bill without costs; with costs it is of course; but after motion to dismiss without costs refused, consent is necessary.

H. 1792, cor. Lds. Comrs.
Hardcastle v. Chettle
4 *Bro. Ch. Ca.* 163.

156. A bill was filed for an account in this case, and one of the creditors, who had come in before the Master and proved his debt, afterwards brought an action at law, against which the court granted an injunction. As defendant had not in the first instance applied for an injunction the court gave him his costs.

H. 1792, cor. Butler, J. sbs. C.
Weymouth v. Boyer,
1 *Ves. jun.* 423.

157. The rule that the plaintiff in a bill of discovery shall pay costs in all cases, is too general; he

§ 1. *Allowed or refused—who liable, &c.*

C—o 363

he ought only to pay them where he files a bill in the first instance, and not where he is compelled to do it by defendant's refusal to render just accounts.

158. A bill for a discovery in this case was dismissed with costs from the coming in of the answer, that answer containing a good defence, after which plaintiff ought not to have gone on.

H. 1792, cor. Thurlow, C.
Hodgson v. Dand,
3 Bro. Ch. Ca. 475.

159. In a suit by the crown on a bond for the post-horse duty, the court cannot give costs to the defendant, in whose favor the verdict was, although the farmer of the duties appeared to be the real party against him. *Aliter* in cases of informations by the Coroner or Attorney-General at the relation of an individual.

P. 1792, in Scacc.
Rex v. Corum, 1 Anstr. 50.

160. There is no rule against giving costs on a new trial being granted, although the verdict was against the opinion of the judge.

P. 1792, in Scacc.
Gosley v. Barlow, 1 Anstr. 47.

161. Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter.

T. 1792, in Scacc.
Smith and others v. Brocklesby,
1 Anstr. 61.

Note: If the cause at law had been directed by the court, or had the question been between the

plaintiff and defendant or his assignees, the court would have granted the motion.

162. The costs of an application being ordered to be paid on account of a deficient notice, it was now moved that a sum certain should be given to avoid the expence of taxing costs in such a trifling matter. Ordered that 20 s. should be paid as the costs.

31 Oct. 1792, cor. Lds. Comrs.
Wilding v. Wilding,
4 Bro. Ch. Ca. 100.

163. There is no instance of costs on an application to put a party to his election to proceed at law or come in under a commission of bankruptcy.

17 Nov. 1792, cor. Lds. Comrs.
Ex parte Wright,
2 Ves. jun. 11.

164. Where an heir is brought before the court in a charity cause, though it is determined that there is no resulting trust for him, he shall have his costs.

H. 1793, cor. Lds. Comrs.
Attorney-General v. Haberdashers' Company and another,
4 Bro. Ch. Ca. 178.

165. After a report that an amendment of a bill is impertinent, a motion to tax costs may be made immediately without notice.

H. 1793, cor. M. R.
Muscott v. Halked,
4 Bro. Ch. Ca. 222.

166. Motion on behalf of defendant, that the costs due to him from plaintiff in C. B., in an action

T. 1793, in Scacc.
Gabitt v. Chaytor, 1 Anstr. 279.

action for same matters as the bill here might be deducted from the costs due from him in equity. The solicitor for plaintiff claimed to have a lien on the costs in C. B. *Quare*, If the lien of an attorney is subject to the equity of this claim in the nature of a set-off. Rule discharged.

T. 1793, in Scacc.
Chapman v. Lansdown,
1 *Anst.* 273.

167. Where a submission to arbitration in a cause in this court is made a rule of the court of King's Bench, and by the award the costs are to be taxed by the master of this court, the court have no jurisdiction to direct a review of the taxation.

Ordo Curiae, 6 Feb. 1794,
Per Loughborough, C.
R. P. Arden, M. R.
4 *Bro. Ch. Ca.* 545.

168. The sum of 5 *l.* for costs, on allowing or over-ruling a plea or demurrer, as also the 5 *l.* deposit on the re-argument being considered inadequate. *Ordered* that the parties shall be liable to such further costs as the court shall award.

Ordo Curiae, 7 Feb. 1794,
Per Loughborough, C.
4 *Bro. Ch. Ca.* 545.

169. Whereas by the practice of the court 5 *l.* only is deposited with the registrar, by the party who appeals from a decree or obtains a rehearing, and only 40 *s.* on rehearing an exception to a Master's report to answer the costs when the decree or former order is not altered, which is not a sufficient recompence, several rehearings being sought merely for delay. It was therefore ordered, on 30th *April* 1701, that when any party appeals from a decree or obtains a rehearing of any cause or exception, such party shall in future deposit 10 *l.* upon rehearing a cause and 5 *l.* on rehearing an exception, when the decree or former order is not materially varied; besides which such party shall be liable to such further taxed costs as the court shall direct. For the due observance whereof it is now *ordered*, that copies of the above abstracted order be hung up in all the Chancery offices.

H. 1794, in Scacc.
Fraser v. Thoborn,
2 *Anst.* 380. 413.

170. Decree for debt and costs. An attachment issued for the debt alone before the taxation of costs, and another for the costs when taxed. They were both held good.

P. 1794, in Scacc.
Gilbert v. Golding, 2 *Anst.* 442.

171. Bill to redeem a mortgage—Decree, referring it to the Master to take the account, and to tax costs, &c. The Master finds the mortgagee overpaid, and reports accordingly. *Per cur.*—It is too late to object to the mortgagee's having his costs,

§ 1. *Allowed or refused—who liable, &c.*

C—o 365

costs, for the report is in conformity to the decree, and must be confirmed.

172. Where the trustees of a charity have no particular mode pointed out to them, but are left to judge for themselves, the court will not saddle them with costs though they oppose the object of the relator's information. In the present case, the relator reaping all the benefits of the testator's bounty under the decree, was ordered to pay his own costs, and those of the trustees also by whom he was opposed.

14 July 1794, cor. M. R.
Attorney-General v. Boulbee,
2 Ves. jun. 390.
Case of Poleworth Vicarage.

173. In a suit for tithes of hothouse plants and other things, the defendant offered to pay into court the value of some of the tithes demanded, but resisted the tithes of the plants. *Per cur.*—He must pay all the costs incurred.

M. 1795, in Scacc.
Worral v. Miller, 3 Anstr. 632.

174. In an information for a charity, where there are any directions to be given, the relator shall not pay costs.

M. 1796, in Scacc.
Attorney-General v. Bolton,
3 Anstr. 820.

175. The plaintiff filed a bill in Chancery, and dismissed it after answer; he then filed another bill in the Exchequer for the same matters; the court stopped his proceeding till the costs in Chancery were paid.

M. 1796, in Scacc.
Baldwyn v. Mayo, 3 Anstr. 855.

SEC. 2. Where Costs are allowed as between Party and Party, and where as between Solicitor and Client; and herein of Costs for Part of a Suit only.

1. THE second mortgagee brings a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor. *Per cur.*—The costs which the first mortgagee has been put to shall not be taxed, as in the case of an adversary suit, but he shall be allowed all his costs and charges, as is done where a solicitor lays out money for his client, and the profits of the mortgaged premises shall be applied to pay off those costs, before they go to sink the principal.

M. 1690, Canc.
Lomax v. Hyde, 2 Vern. 185.
1 Eq. Abr. 126. pl. 9.

2. A mortgagee had sustained great charges to defend a suit at law brought against him by the heir of the mortgagor, who in vain endeavoured to

H. 1705, cor. Cowper, C. S.
Ramsden v. Langley,
2 Vern. 536.

to defeat the mortgage by an entail. Upon a bill afterwards brought by the heir to redeem, the mortgagee was allowed his full costs expended in that suit, and not tied down to the costs taxed, and he was also allowed his costs in taking out administration to the mortgagor or principal creditor.

8 May 1792, cor. Thurlow, C.
Moggridge v. Thackwell,
1 Ves. jun. 475.

H. 1794, cor. Loughb. C.
Dungey v. Angrove,
2 Ves. jun. 304.

3. This cause being between relations, the costs of all parties were allowed out of the estate, as between attorney and client.

4. A tenant having filed a bill of interpleader against his landlord under circumstances of fraud and collusion, the same was dismissed with costs to the landlord, as between attorney and client.

SEC. 3. Where Costs are awarded as a Punishment in Cases of Fraud, Vexation, Neglect, or Misbehaviour.

Anon. 1 Ch. Ca. 71.
1 Eg. Abr. 125. pl. 2.

1. A Solicitor prosecuted a suit in the name of a stranger, *who not being to be found*, the M. R. declared, that if there were one precedent in the case he would make another, and order the solicitor to pay costs.

H. 1690, cor. Lds. Comrs.
Dyer v. Tymewell,
2 Vern. 123.
1 Eg. Abr. 126. pl. 10.

2. The court will give costs to be ascertained by the party's own oath, where gross fraud appears.

H. 1690, Canc.
Whittingham v. Thornburgh & al.
2 Vern. 206.

3. The court in this case set aside a policy for a life insurance for fraud, and decreed the party to pay costs. The premium of insurance was ordered to go in part of the costs.

22 Mar. 1700, Dom. Prac.
Bretland and another v. Cope & al.
Colles' P. C. 97.

4. Executors guilty of a breach of trust or fraud shall pay costs.

M. 1700, cor. C. S.
Goldsmith v. Bruning,
1 Eg. Abr. 90. pl. 4.

5. The court in this case decreed a marriage brocade bond to be delivered up, and if not done on service of the order, defendant to pay costs.

25 Feb. 1701, Dom. Proc.
Vaughan & Uz. v. Thurston,
Colles' P. C. 175.

6. Executor's answer in equity being falsified, he shall pay costs.

21 Jan. 1702, Dom. Proc.
Haberdashers' Company v. Attorney-General, 1 Bro. P. C. 9.
6 Vin. 323. c. 3.
2 Eg. Abr. 237. c. 2.

7. The trustees of a charity mismanage the fund, and neglect the objects of it. Held, that they should make good the deficiency out of their own estate, and pay the costs of the suit.

§ 3. Where awarded as a Punishment.

C—D 367

8. An appeal in order to avoid the payment of a sum of money decreed in the original cause, shall be dismissed with costs.

19 Dec. 1701, Dom. Proc.
Hyndmarsh & Ux. v. Everard,
Colles' P. C. 241.

9. An administrator suggesting a debt due to himself, and claiming to retain for it, and failing to prove it, is liable to costs.

13 May. 1705, Dom. Proc.
*Priffick and another Administrators
v. Figures Executors*,
Colles' P. C. 344.

10. Where an executor makes an unfair apportionment, which, by his answer, he swears to be just, and which is afterwards falsified in several instances, upon his own examination on interrogatories, he shall pay the costs of the suit.

17 Dec. 1705, cor. Dom. Proc.
*Sheppard and another v. Smith
& al.* 1 Bro. P. C. 115.

11. The plaintiff in this case took an annuity of 20*l.* under a settlement made on him by A, which it appeared plainly was intended by A. to be, and was held by the court to be in lieu of two annuities of 10*l.* each, given him under two wills; but because the plaintiff had filed his bill for all the annuities, the court decreed him to pay costs, as in his conscience he knew that A. intended the annuity of 20*l.* should be received by him in satisfaction of the devised annuities.

P. 1708, cor. Cowper, G.
Davison v. Goddard,
Gilb. Eq. Rep. 65.
2 Eq. Abr. 217. pl. 1.

12. It is the constant course of the court where a mutual account is decreed, to reserve costs till after the report, that the court may have it in their power to punish the wrong-doer.

16 Feb. 1709, Cant.
Rider v. Bailey,
2 Eq. Abr. 237. pl. 5.
6 Vin. Abr. 332. pl. 32.

13. Where a creditor by judgment recovered, is afterwards found guilty of fraud respecting the whole of his demand, he shall pay costs both at law and in equity.

5 April 1709, Dom. Proc.
*Lloyd v. Wynne & Ux. Admini-
stratrix*, 1 Bro. P. C. 261.

14. A corporation being trustees for a charity, and in possession of the charity estate, and suppressing or concealing any evidence relating to the charity, are liable to the costs of the suit.

10 June 1713, Dom. Proc.
*Corporation of Hertford v. Poor of
Hertford*, 1 Bro. P. C. 399.

15. An appeal brought on grounds known to the appellant himself to be frivolous and false, was dismissed with exemplary costs, viz. 40*l.*

19 June 1713, Dom. Proc.
Sbere v. Cock, Colles' P. C. 437.

16. Mortgagee shall not operate his pledge with costs which he occasioned by an unjust defence.

H. 1717, cor. Cowper, C.
Mocatta v. Murgatroyd,
1 P. Wms. 395. 2 Eq. Abr. 612. pl. 2.

17. Costs in this case were awarded against a trustee, who availing himself of the want of a formal declaration of trust, refused to account or allign

13 Feb. 1717, Dom. Proc.
O'Hara v. O'Neill,
2 Bro. P. C. 39.
21 Vin. Abr. 497. pl. 6. (n.)
2 Eq. Abr. 745. pl. 9.

assign a lease (which he held in trust) on payment of the money advanced by him.

T. 1717, cor. Cowper, C.
Attorney General v. Brewers' Com-
pany, 1 P. Wms. 376.
2 Eq. Abr. 530. pl. 6.
Vide Parrot v. Treby, Prec. in
Ch. 254.

18. Costs are not always to follow the event of the suit, as in this case, where though money was found due to the defendants upon balance, yet it being considerably less than what they claimed by their answer, and there appearing an intention on their part to overcharge a charity for which they were trustees, ordered they should pay their own costs.

M. 1719, cor. Parker, C.
Fawkes v. Pratt, 1 P. Wms. 593.
2 Eq. Abr. 1. pl. 3. 723. pl. 1.

19. The court will order an attorney or solicitor guilty of gross neglect to pay costs.

T. 1722, cor. Macclesfield, C.
Hildyard v. South-Sea Company
and another, 2 P. Wms. 76.
2 Eq. Abr. 238. pl. 13.

20. *A.* by a forged letter of attorney transferred *South-Sea* stock of *B.* to *J. S.*, who afterwards received the next dividend. Lord Chancellor held this transfer void, and decreed that the company take the stock from the defendant the transferree, and restore it to *B.* the plaintiff, the original proprietor; and that *J. S.* pay back the dividend to plaintiff, and pay both company and plaintiff their costs.

1724, cor. Parker, C.
Nutt v. Burrel,
2 Eq. Abr. 364. pl. 18.

21. *A.* brought a very frivolous suit against *B.*'s executrix for a legacy which the testator had directed should be forfeited in case *A.* gave his executrix any trouble. Lord Chancellor would not declare the legacy forfeited, but said, if *A.* did not pay the executrix her costs, he would dismiss the bill.

T. 1725, cor. King, C.
Mozent and others, Creditors of
Abraham,
2 Eq. Abr. 103. pl. 1.
Sel. Ca. in Ch. c. 45.

22. The clerk to a commission of bankruptcy, in the presence of the person at whose instance he issued out the commission, no other person being by, took away a *scrutore* and opened it, in which were all the papers of the bankrupt, and made a pretended sale by an appraiser. On petition he was ordered to be examined on interrogatories, as to the real value of the goods, and to pay the value, and all costs occasioned by this irregularity; and all the goods not disposed of to be delivered over; and to be removed from the clerkship.

T. 1725, cor. King, C.
East v. Ryal, 1 P. Wms. 284.
2 Eq. Abr. 199. pl. 6.

23. Governors of a charity, though not guilty of corruption, yet if extremely negligent, to pay costs.

§ 3. Where awarded as a Punishment.

Two insufficient answers to the original, and one insufficient answer to the amended bill. Defendant ordered to pay 9*l.* costs.

24. If an answer be reported scandalous or impertinent, the costs by the rule of the court are to lie upon the counsel.

25. *A.* contracted with *B.* to sell him a house in *Middlesex*, which was settled by his marriage articles, but not performing his contract, and availing himself of the want of registry of such articles, the court decreed him to pay all costs for the fraud in concealing the deed.

26. A trustee misbehaving himself, was ordered to pay costs out of his own pocket, and not out of the trust estate.

27. The commissioners under a commission of bankrupt in this case were removed (under the stat. of 5 *G. 2. c. 30. f. 42.*) for taking more than 20 *s.* a-piece at each meeting, and for expending large sums out of the bankrupt's estate in eating and drinking. Decreed, that they should pay the costs of the present petition, together with the costs of the renewed commission to be taxed by the Master.

28. In all cases where an advantage is taken of the distresses and improvident bargains of young heirs, the court will extend their relief, and make the offender pay the costs, as well for the sake of public justice as to prevent the ruin of private families.

29. If a trustee merely to have a point determined relative to his private interest, brings a *cessuy que trust* before the court, he shall pay the whole of the costs of the suit for such vexatious behaviour.

30. The defendant having been guilty of a gross fraud, was decreed to refund the principal money he cheated plaintiff of, with interest, from the time of payment, and all costs of both original and cross bills.

In notorious frauds, the court anciently made a defendant pay *exemplary* costs, but this is now disused, from the difficulty of carrying it into execution.

C—D 369

M. 1725, in Scacc.
Harman v. Linnist,
Bunb. 203.

H. 1726, cor. King, C.
Anon. 2 *P. Wms.* 406.
2 *Eq. Abr.* 240. pl. 21.

M. 1727, cor. King, C.
Beatniff v. Smith,
1 *Eq. Abr.* 357. c. 11.

M. 1734, cor. Talbot, C.
Loyd & Ux. v. Spillett & al.
3 *P. Wms.* 347.

Feb. 1739, cor. Hardw. C.
Ex parte Haliday,
2 *Eq. Abr.* 98. pl. 7.
7 *Vin. Abr.* 77. pl. 8.

9 Feb. 1740, cor. Hardw. C.
Sir John Barnadiston v. Lingood,
2 *Atk.* 133. *Barnard.* 337.

July 1740, cor. Hardw. C.
Henley v. Philips,
2 *Atk.* 48.

4 July 1740, cor. Hardw. C.
Walbam v. Broughton, et d contra,
2 *Atk.* 43.

16 July 1740, cor. Hardw. C.
Biggleston v. Grubb, 2 Atk. 47.

17 Nov. 1740, cor. Parker, J.
at the Rolls.
Hide v. Haywood, 2 Atk. 126.

(a) The court would have given the executors their costs if there had been no provision in the will. *Vide Humphrey v. Moore*, 2 Atk. 108.

(b) *Vide Wilkins v. Hunt*, 2 Atk. 151.

18 April 1741, cor. Hardw. C.
Lady Coddington v. England,
2 Atk. 167. *Barn.* 436.

31 Mar. 1742, cor. Hardw. C.
Ex parte Smith, 1 Atk. 139.

2 July 1741, cor. Hardw. C.
Thornhill v. Evans,
2 Atk. 330. 9 *Mod.* 331.

P. 1746, cor. Fortescue, M. R.
Williams v. Longfellow,
3 Atk. 582.

9 Aug. 1754, cor. Hardw. C.
In re Hogan, a Lunatic,
3 Atk. 813.

12 July 1755, cor. Hardw. C.
Anon. 2 *Ves.* 631.
And *vide* note to S. C. ante, tit.
Bill, f. 18. pl. 10.

c Feb. 1770, Dom. Proc.
Creston Bart. v. Cnner,
6 Bro. P. C. 409.

31. Where a plaintiff is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and his bill will be dismissed with costs.

32. Notwithstanding a testator directed that his executors, for any expences they should be put to, should be allowed their costs out of his estate (a), yet as in this case there was a plain *fraud* in the executors, the court decreed costs against them (b).

33. Where a multiplicity of actions have been brought, and the custom might have been tried in one, it is such a vexation, that the plaintiff shall have the costs both in law and equity.

34. If a whole petition is recited in an affidavit of service, in order to swell the expence, the court will make the attorney who drew it pay the costs out of his own pocket.

35. *E.* making *T.* believe, that the grant of a stewardship of a manor was so drawn that he might revoke it at pleasure, whilst *E.* had taken it to himself and his heirs, the court held that *E.* having abused the trust reposed in him, and manifestly intending to get the estate into his own hands, the grant of the stewardship must be given up, and *T.* must have his full costs of suit.

36. If a defendant disclaims generally, and the plaintiff replies to her answer, and serves her with a *subpoena* to rejoin, she is entitled to have costs against him for the vexation.

37. Where affidavits were taken before a person who was a solicitor in the cause, they were not permitted to be read, but the petition was dismissed, and the costs directed to be paid by the solicitor who took the affidavits.

38. In case of a reference for scandal in the defendant's answer, the Master usually taxes very large costs; and if it be very scandalous the Master may tax 100*l.* or more for costs. So in a bill reported impertinent very great costs are commonly taxed.

39. Upon a submission of all matters in difference an award of mutual releases was made, and

§3. Where awarded as a Punishment.

C—o 371

that certain securities should be delivered up. No notice was taken of two bonds. It shall be presumed these bonds were under consideration by the arbitrators; and if they are afterwards put in suit, the plaintiff shall pay costs.

40. An husband by fraud made his wife transfer her stock to him, which he had agreed to settle to the marriage uses. Decreed that he transfer the stock to trustees, and pay the costs for example's sake.

26 Feb. 1780, cor. Buller, J.
abf. C.
Lampert v. Lampert,
1 Ves. jun. 21.

41. Notwithstanding the common course of the court is to give only 40 s. costs upon dismissal of a suit heard on bill and answer, yet if the party be vexatious full costs will be given.

M. 1784, cor. Thurlow, C.
Manjel v. Bowles,
1 Bro. Ch. Ca. 403.
1 Eq. Abr. 126.
Vide Newtham v. Gray, 3 Atk.
288. *Johnson v. Brown*, 3 Atk. 1.

42. An executor having put the testator's next of kin, for whom he was trustee, to prove their relationship, shall pay the costs of establishing the kindred.

H. 1787, cor. Thurlow, C.
Lawson v. Copeland,
2 Bro. Ch. Ca. 157.
1 Eq. Abr. 125.

43. Bill by an heir at law against a devisee for an account of rents and profits; on an issue *deviseavit vel non* directed, a verdict was found for the defendant. And on the cause coming on for further directions, and the heir not appearing, the only question was as to costs. Lord Chancellor dismissed the plaintiff's bill with costs; the rule being, that where an heir is made defendant he shall have his costs; but where he is plaintiff, and files a vexatious bill to harass the devisee, he shall pay costs.

H. 1791, cor. Thurlow, C.
Seal v. Brownston,
3 Bro. Ch. Ca. 214.

44. Where a bill was unnecessarily filed by an heir at law, the costs of the real estate were given out of the real estate, and the costs of the personal out of the personal estate; so that the heir at law by that means paid his own costs.

8 Mar. 1791, cor. Thurlow, C.
Leacroft v. Maynard,
Pearson v. Leacroft,
3 Bro. Ch. Ca. 233.
1 Ves. jun. 280.

45. If a party has unconscientiously obtained a judgment at law, and is afterwards brought into equity to make a discovery, he must pay the costs of both proceedings: whereas if the discovery was obtained before the expences at law were incurred, he will get his costs in equity; but there is reason in the difference, for after obtaining a judgment against conscience a party goes into equity as a criminal, and is punished in costs; but till he has made use of unconscientious advantages

P. 1792, in Scacc.
London Assurance Company v. Hankey, 1 Anstr. 9.

it cannot be presumed that he means to do so. The plaintiff in this case having had the advantage of the discovery fought, must pay for it.

21 Dec. 1792, cor. Lds. Comrs.
Ex parte Shaw, 2 *Ves. jun.* 40.
Vide Lock v. Bromley, 3 *Ves.*
jun. 40. S. P.

46. A bankrupt, like a pauper, loses his privilege by misconduct; therefore where, after two petitions dismissed, he presents a third for the same purpose, it will be dismissed with costs, and if not able to pay them, he must be committed; but the court will not make an order to restrain him from presenting any more.

1 July 1793, cor. Loughb. C.
Ball v. Montgomery,
2 *Ves. jun.* 191.
4 *Bro. Ch. Ca.* 339.

47. Where a wife, who had eloped from her husband and lived in adultery, instituted a groundless suit against him in equity, and also in the ecclesiastical court, decreed he should have his costs out of the accumulation of her separate estate.

2 Aug. 1794, cor. Loughb. C.
Lord Lonsdale v. Littledale, 2 *Ves.* 451.
Vide Chicor v. Lequesne, 2 *Ves.* 315. and *Ward v. Periam*, there cited.

48. An arbitrator combining shall pay costs.

17 Feb. 1796, cor. M. R.
Lock v. Bromley, 3 *Ves. jun.* 40.
Vide Ex parte Shawe, 2 *Ves.*
jun. 40.

49. Costs allowed personally against an uncertificated bankrupt in a case of fraud and misconduct.

15 Mar. 1796, cor. Loughb. C.
Franco v. Fianco, 3 *Ves. jun.* 75.

50. The demurrer in this case being put in for delay, and to cover a breach of trust, was overruled with costs. The cause of demurrer was, for that *cestuy que trusts* were not parties.

SEC. 4. Of the Taxation of a Solicitor's Bill of Costs.

28 April 1726, Canc.
Parker v. Stanley,
2 *Eq. Abr.* 241. pl. 25.
6 *Vin. Aibr.* 267. pl. 21.

1. **A** Sum in gross shall never be added to a bill of costs after it is taxed by a proper officer.

T. 1730, cor. King, C.
Anon. Misf 331.

2. An order of taxation was obtained in this case, empowering the Master to examine the solicitor on personal interrogatories as to his receipts only, but an order may be obtained on proper affidavits for the Master to examine him as to his disbursements also.

4 May 1742, cor. Hardw. C.
Drapers' Company v. Davis,
2 *Atk.* 295.

3. A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, and also several extraordinary charges appearing in his bill, Lord *Hardwicke*, though adjusted and allowed

§ 4. Taxation of Solicitor's Bill.

C—e 373

allowed 17 years ago, referred the bill to be taxed, and ordered the judgment and other securities to be delivered up (a).

(a) *Vid.* *Walmley v. Booth*, 2 Atk. 25, 27, 29. 1 Ves. 380. 1 Ves. 138. *Oldham v. Hand*, 2 Ves. 259, 549. *Saunderson v. Glas*, 2 Atk. 298. (n.) 1. *Ofmond v. Fitzroy*, 3 P.Wms. 131. and notes.

4. Where any part of a solicitor's bill relates to business done in this court, the whole bill may be taxed, although part of the bill be for conveying, levying fines, &c. and although part of the business concern other persons jointly with the party applying for taxation.

17 Mar. 1791, cor. M. R. *Margerum v. Sandiford*, 3 Bro. Ch. Ca. 233.

5. Several bills of costs were delivered in, settled, and paid, in the course of a long cause, and a receipt in full given. At the end of the cause, the client moved to refer them all for taxation. The order was discharged.

P. 1793, in Scacc. *Piffor v. Dunbar*, 1 Anstr. 186.

6. An attorney cannot take a bond of his client for unliquidated costs. Notwithstanding such bond and a mortgage had been given in this case the bills were ordered to be taxed, and upon payment the defendant to reconvey, and the bond declared void.

T. 1793, cor. Lough. C. *Newman & al. v. Payne*, 4 Bro. Ch. Ca. 350. 2 Ves. jun. 199. See this case more at large, post. tit. Solicitor and Client. *Vide* *Walmley v. Booth*, 2 Atk. 25.

7. A solicitor delivered in a bill of costs, including an item of 90*l.* which, though fairly due, could not be allowed on taxation. He delivered a second without that item. On referring the latter for taxation, less than a sixth was taken off. The court would not give costs on either side; for the delivery of a second bill so different from the first was a sufficient ground of suspicion for the client to apply for a taxation.

T. 1793, in Scacc. *Webb v. Stone*, 1 Anstr. 260.

8. On taxation of a solicitor's bill of costs, the court cannot make the attorney pay the costs of the taxation, unless one-sixth is taken off; for it is only in such case that the statute gives the court a discretionary power.

M. 1794, in Scacc. *Yea v. Yea*, 2 Anstr. 494.

Where a solicitor has been seven years without getting his bills taxed, after an order so to do, and they are lost in the mean time in the Master's office, the court will not allow them to go again to the Master.

9. Where a solicitor has been guilty of great delay in bringing in his bills, the court will not give him the costs of taxation, although less than one-sixth is taken off.

T. 1795, in Scacc. S. C. 2 Anstr. 589.

SEC. 5. In what Cases and in what Manner Security shall be given for Costs.

H. 1718, in Scacc.
Ker v. Dut. of Munster,
Bunb. 35.

M. 1726, cor. King, C.
Gibson v. Scudamore, Mosf. 7.

H. 1727, Canc.
Godwin v. Archer,
2 P. Wms. 452.
1 Eq. Abr. 350. pl. 4.
Vide Meliorucchy v. Meliorucchy, 2 Vef. 24. *Gage v. Lady Stafford*, 2 Vef. 557. *Anon Mosf. 175.*

P. 1729, cor. King, C.
Anon. Mosf. 175.

M. 1729, in Scacc.
Fenwick v. Fortescue,
Bunb. 272.

M. 1731, in Scacc.
Lady Latouley alias Halpen v. Halpen, Bunb. 310.

19 Mar. 1733, Dom Proc.
*Ducefs of Hamilton v. Manby Ad-
ministrator*, 4 Bro. P. C. 152.

17 O&C. 1741, cor. Hardw. C.
Ordo Curiae,
2 Aik. 139. (n.)

See this order at large, ante,
tit. Bill, f. 7. pl. 26. and a note
of Lord Hardwicke's reason for making it.

1. **W**HERE an alien plaintiff is to give security for costs, a deposit in money will not be permitted to be made instead thereof.

2. If the plaintiff resides in another kingdom, the defendant may compel him to give security to pay costs.

3. Where an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged by statute 7 Ann.

4. Where the plaintiff is in the service of a foreign envoy, he must give security to pay costs.

5. One protected by the *Hessian* envoy brought his bill to stay defendant's proceeding in ejectment, the court denied a motion that he should give security for costs; for plaintiff was forced into court.

6. A feme covert was permitted to change her *prochein amy* after a considerable progress in the cause, the new one entering into a recognizance to answer the costs and abide the order on hearing.

7. Upon application to re-hear a cause, an order was made that the petitioner should be at liberty to re-hear, on payment of all the costs incurred since the decree within a week after service of a taxed bill of costs. But on an appeal from this order, it was declared, that there was not a sufficient ground for the court's imposing these terms on the petitioner, but that it would have been sufficient if the court had required him to give security for or submit to pay the costs in case the decree should not be materially varied upon the re-hearing.

8. Ordered, that no bill in nature of a bill of review shall be filed without leave of the court, and a deposit of 50/. as a pledge to answer costs and damages.

9. Security for costs by plaintiff beyond sea, should be applied for before praying time to answer, if it appears on the face of the bill, or is in defendant's knowledge, that plaintiff is resident abroad; otherwise it is waived: but if defendant is a stranger to the plaintiff's residence abroad, he may apply for security in any stage of the cause.

19 Oct. 1750, cor. Hardw. C.
Meliorucchy v. Meliorucchy,
2 Vesf. 24.

10. Where the party lives abroad, 40*l.* to answer costs of suit is the old rule, which though now low is not increased by the court, unless on terms. *N. B.* The terms agreed upon in this case were, that plaintiff should find security to answer 300*l.*

27 July 1754, cor. Hardw. C.
Gage v. Lady Strafford,
2 Vesf. 557.

11. Plaintiff was permitted in this case to dismiss his own bill without costs, unless the defendant who had destroyed the subject of the suit, and absconded, should find security for payment of costs.

P. 1787, cor. Thurlow, C.
Knox v. Brown,
2 Bro. Ch. Ca. 186.
1 Eq. Abr. 126.

12. An application that the plaintiff (living in Ireland) shall give security for costs, must be before answer.

P. 1787, cor. Thurlow, C.
Craig v. Bolton,
2 Bro. Ch. Ca. 609.

13. Bill by the *prochein amy* of a *feme covert* against her husband. It was moved on the part of defendant, that all proceedings might be stayed until the *prochein amy* should find security for costs, or another *prochein amy* be named, on an affidavit of the bad circumstances of the *prochein amy*. But Lord Chancellor refused to make any order, considering that the court could not inquire into the responsibility of a *prochein amy* more than of any common plaintiff. An infant or *feme covert* must sue by *prochein amy* that there may be a person *suable* for the costs, but the court must content itself with making some person *amesnable*, without going into an inquiry as to his ability.

M. 1791, cor. Thurlow, C.
Squirrel v. Squirrel,
2 P. Wms. 298. (n.)
Note; Lord Chancellor relied on an additional circumstance in this case, viz. that the application was not made till after defendant had answered, which might be considered as a waiver of the application, though alleged that the circumstances of the *prochein amy* were not discovered till after answer.

14. To entitle a defendant to security for costs, it is not sufficient that plaintiff appears by the bill to be out of the jurisdiction; he must appear to be resident abroad; then it is of course.

M. 1791, cor. Thurlow, C.
Green v. Charnock,
1 Vesf. jun. 396.

15. A plaintiff in equity becoming bankrupt since the filing of the bill, will not be compelled to give security for costs.

H. 1794, in Scacc.
Anon. 2 Anstr. 407.
N. B. There was no instance in practice to support this motion.

16. A tenant having filed a bill of interpleader against his landlord under circumstances of fraud

H. 1794, cor. Loughb. C.
Dungray v. Angove,
2 Vesf. jun. 304.

and collusion, the same was dismissed with full costs to be paid by the plaintiff and his solicitor, and the latter was ordered to shew cause why he should not be struck off the roll.

P. 1795, in Scacc.
James v. Gilladam, 2 Anstr. 552.

17. Plaintiff being an uncertificated bankrupt, and not residing where he is described by the bill to reside, will be compelled by the court to give a note of his residence, or security for costs.

P. 1795, Scacc.
Adams v. Coletburst,
2 Anstr. 552.
Vide Beckman v. Legrainge,
2 Anstr. 359.

18. Motion that the plaintiff (in equity) should give security for costs, on affidavit that he was about to leave the kingdom, refused.

SEC. 6. Where the Claim for Costs dies with the Person, and in what Cases there may be Revivor for Costs only.

T. 1719, in Scacc.
Sir E. Delaval v. Sir E. Blackett,
Bunb. 45.
H. 1723, Scacc.
Dodson v. Oliver, Bunb. 160.

1. UPON a bill of revivor for the duty as well as the costs, an executor defendant shall pay costs; *aliter*, when the revivor is only for costs which had not been ascertained in the lifetime of the testator.

T. 1725, cor. King, C.
Christmas v. Christmas,
Sel. Ca. in Cb. 21.
2 Eq. Abr. 238. pl. 16.
Sed vide Blower v. Morris, 3 Atk. 772.

2. A bill was dismissed with costs; the person who was entitled to costs died before they were taxed. There is no remedy.

Kemp v. Mackrell, 3 Atk. 812. 2 Vef. 580.

T. 1725, cor. King, C.
Anon. Sel. Ca. in Cb. 21.
2 Eq. Abr. 238. pl. 16.
Sed vide Kemp v. Mackrell,
3 Atk. 812. 2 Vef. 580. where
the plaintiff died before the costs
were taxed, yet, on the circumstances of the case, defendant was allowed to revive for costs.

3. A bill was dismissed with costs, and the person who was entitled to them died before they were taxed. There is no relief to be had in this case.

M. 1731, cor. King, C.
James v. Phillips,
2 P. Wms. 658.

2 Eq. Abr. 241. pl. 28.
Costs directed to be paid out
of a particular fund, though not
taxed, shall not be lost by the
death of the party entitled to them.

4. Where the suitor has paid the register his fees, and the register neglects to enter the suitor's attachments, by which means his process becomes irregular, the suitor is to pay costs to the other side, but shall recover them from the officer.

Vide Blower v. Morris, 3 Atk.
772. *Johnson v. Peck*, 2 Vef.
465. *Kemp v. Mackrell*, 2 Vef.
579.

And though the officer in such case dies, his executors will be ordered to pay them out of his assets, it being matter of contract, and therefore not dying with the person,

§6. *Revivor for Costs only.*

C—O 377

5. A bill by an infant by his *prochein amy* was dismissed for want of prosecution; if either of them die before the costs are taxed, the costs are lost.

M. 1733, in Scacc.
Morgan v. Crompton, Bunb. 332.

6. Bill was dismissed with costs, which were taxed; a bill of revivor was brought singly for (these) costs, but on demurrer it was held that the bill would not lie.

H. 1735, cor. Talbot, C.
Tborn v. Pitt,
Sel. Ca. in Ch. 54.
2 Eq. Abr. 180. pl. 3.

rule be that where a bill is dismissed with costs, the party entitled to them cannot revive for that, it must be taken to mean where they are not taxed and liquidated to a sum certain, for then it becomes a duty; and though the bill be dismissed, it is not so much out of the court, but the party in consequence of such dismissal is liable to the process of the court by subpoena, attachment, &c. But per Lord Chancellor—It is a rule, that unless in account, where both parties are actors, they cannot revive: and said, he knew of no instance of revivor in such a case as this;—that it was very odd, but the rules of the court must be observed.

In arguing the demurrer it was insisted, that though the constant

7. There was a decree in this case against an executor with costs out of the assets. The executor paid the sum decreed, but not the costs. Plaintiff then died, and a bill was brought to revive for costs. Objected, that a bill to revive for costs only was improper; and that payment out of assets was only incident to the costs in respect to the sum decreed. Lord Chancellor thought the rule, not to revive for costs only, a hard rule, the costs being frequently more than the debt. The present case was out of the rule, for the decree was not *in personam* but executory, and to be paid out of assets; and if the executor had died, plaintiff might have revived against the representatives of the testator, and followed the assets *ubicunque*.

25 July 1752, cor. Hardw. C.
Johnson v. Peak, 2 Vef. 465.

8. Plaintiff's bill was dismissed with costs to be taxed; they were taxed, and the proper process issued, upon which plaintiff for non-payment was committed to the Fleet. Defendant died; there was no revivor, and plaintiff moved to be discharged, no person being in existence to sustain the execution, or who had a right to detain him there; the cause was not revived from an apprehension that there could be no revivor for costs only. Lord Chancellor held clearly there might for costs taxed, but doubted if plaintiff could be detained; *et ergo advise vult* as to the practice at common law; with which his lordship having made himself acquainted, decreed that unless the representatives of the deceased defendant revived within a reasonable time, plaintiff must be discharged.

July 1752, cor. Hardw. C.
White v. Hayward,
2 Vef. 461-2-3-4.

Vide Bassett v. Prideaux, Clark
v. Withers, 1 Salk. 322. *Whar-*
ram v. Broughton, 1 Vef. 180,
186.

9. Costs were decreed to all parties out of a real estate; one of them who was entitled to receive costs

1 April 1754, cor. Hardw. C.
Blower v. Morrett,
3 Aik. 772.

costs died before they were taxed, *non moriuntur cum personâ*, for the decree made a lien on the real estate, and the heir is entitled (a).

(a) *Vide* White v. Hayward, 2 Ves. 461. Kemp v. Mackrell, 3 Atk. 812. 2 Ves. 579. Hall v. Smith, 1 Bro. Ch. Ca. 438.

If any thing had remained to have been done and not decreed, the representative of the deceased party by reviving would have been entitled to the costs, even if they had not been directed to stand a charge on the real estate (b).

(b) The general rule that there can be no revivor by an executor or administrator for costs, when costs have not been taxed, is upon this principle, that costs being looked upon as a wrong *moriuntur cum personâ*. All these cases have been determined where costs are decreed personally. Otherwise where decreed out of real estate.

A decree for a sum against an executor with costs out of assets, is not a decree *in personam*, but executory; and if he dies, the plaintiff may revive against the representative of the testator, and pursue the assets (c).

(c) *Vide* Johnson v. Peek, 2 Ves. 465.

The writ by *Journey's accounts* lies only between the same parties; neither an executor, nor administrator, nor heir, can have it; so that at law all costs are personal; but where there is a fund to answer costs, and it is made liable, the representative by reviving will be entitled.

7 Aug. 1754, cor. Hardw. C.
Kemp v. Mackrell,
3 Atk. 812. 2 Ves. 579.
Vide White v. Hayward, 2 Ves.
461. Johnson v. Peek, 2 Ves.
465. Blower v. Morrets, 3 Atk.
772.

10. A cross bill in this case was dismissed with costs; but before they were taxed the plaintiff died. The question then was, Whether defendant could revive, or if there could be any method of proceeding in respect of these costs? Lord Chancellor—Upon the general rule that costs *moriuntur cum personâ* there can be no revivor, but it is otherwise where the costs have been taxed. His lordship thought this a very hard rule, and the distinction a very nice one; for the right to costs is the same before taxation as after, only the *quantum* has not been ascertained. The present however is one of the cases in which the strict rule ought to be dispensed with, for where there is a particular fund to answer costs, the court will order them to be paid out of that fund. The cause was heard on the original and cross bill at the same time, and the decree in the original bill gave defendant his costs out of a surplus. Now a cross bill is a defence, and so connected with the original bill that they are always considered but as one cause, and nothing can be more natural than for the defendant to deduct the costs he was to pay on account of the cross bill,

§ 6. *Revivor for Costs only.*

C—o 379

bill, out of what he was to receive on account of the original bill. The taxing of costs in the cross bill ought to have been stayed till the Master had taken the account in the original, and that it was seen what was due to the defendant in the cause, for they are both connected together, and can only be considered as one. Lord Chancellor therefore allowed the exception to the Master's report, for not allowing the defendant in the cross bill to revive for costs against the plaintiff who is dead.

11. To a bill of revivor in this case defendant pleaded that it was for costs only. Lord Chancellor said, the costs were taxed, which took the case out of the general rule, but if they had not been taxed, there was an order that they should be paid into the Bank, which (though not paid) also took the case out of the general rule. Plea over-ruled.

H. 1785, cor. Thurlow, C.

Hall v. Smith,

1 Bro. Ch. Ca. 438.

In this case the register mentioned *Edgell v. Brown*, a MS. case, (23 July 1732,) in addition to those already collected on this subject.

12. After a verdict on an issue directed, certain deeds were decreed to be delivered up to the plaintiff: the Master then settled the amount of the costs, but before the report, the plaintiff died. On demurrer to so much of the bill by his devisee as prayed revivor, Lord Chancellor inclined to hold that the rule not to revive for costs only was not applicable, where the party to receive them dies; also that the taxation would relate to the time when the amount was settled, so as to take it out of the rule: but the demurrer was over-ruled, because it did not appear on the bill that the decree had been executed by delivering up the deeds. Lord Chancellor said, where the party to pay costs dies before they are taxed, there can be no revivor for *them* only, because it is a *personal* demand.

22 Mar. 1794, cor. Loughb. C.

Morgan v. Scudamore,

2 Ves. jun. 313, 315, 316.

If a debtor in costs at law dies, they die with him; but if the party to receive them dies, his representative may have a *scire facias*.

There is only one case at law where there can be a judgment for costs, and that is where judgment is in favour of the defendant. The stat. of 8 & 9 W. 3. c. 11. (a) gives him costs, and the 4 Jac. 1. c. 3. says expressly, that where the plaintiff if judgment should be given for him would be entitled to costs, (for there never can be a judgment to him, his costs being added to the debt or damages,) the defendant if he prevails takes his judgment for costs.

(a) So in various cases by other statutes, viz. 23 H. 8. c. 15. 8 Eliz. c. 2. 13 Car. 2. stat. 2. c. 2. f. 3.

Note: The register mentioned a strong authority on the principal point, in a case before Lord Bathurst (b);—A perpetual injunction was decreed with costs against the defendant. The plaintiff died, and

(b) *Ascough v. Townsend.*

and his representative filed a bill to hold on the injunction. Lord Bathurst said, there was no occasion for that, for the injunction would remain notwithstanding the death of the party; it was therefore unnecessary, and nothing remained but the costs.—The register also mentioned another case in the Exchequer, before Lord Chief Baron Parker, which he believed was *Milligan v. Milligan*.

9 Feb. 1796, S. C.
Cor. Loughborough, C.

(c) As in *Price v. Humphreys*,
cor. Camden, C. in July 1766.

The demurrer in this cause having been overruled in *March* 1794, because the decree was not performed, defendant now stated that all the decree was executed, wherefore the principal point was again argued. *Per* Lord Chancellor—The question is, Whether, if the plaintiff dies after a decree entitling him to costs, but before taxation and report, the court will permit the suit to be revived purely to obtain payment of the costs? His lordship said, if upon the ground of a duty (c) which ought to be discharged by the defendant, the plaintiff's representatives have by a judgment a vested right to recover the costs, there can be no reason not to establish, that where the plaintiff dies after a judgment for costs, though not taxed at his death, he may by a decree for revivor have those costs. When the case occurs of an abatement by the death of the defendant, it will be fit to consider whether the inconvenience of drawing the account of assets into equity will prevail against that principle which seems very proper to be followed.

Vide *Lloyd v. Powis*, 19 June 1671, which is the first case where the plaintiff died under such circumstances.

In *Lord Dacres, v. Tuite* 1675, the decree being inrolled and the costs recoverable out of the assets, held a bill of revivor will lie for costs only. In *Temple v. Rowse*, 1679, demurrer to a bill of revivor for costs allowed, the decree not being inrolled. In *Edgehill v. Brown*, 23 July 1732, the decree was not inrolled, but Lord King thought inrollment not necessary to constitute the demand by plaintiff's representative for costs taxed; the Master had made his report, and the revivor was held proper. In *White v. Hayward*, Lord Hardwicke followed the same ground. In *Blower v. Morrets*, 1754, costs decreed out of the estate were held a *lien* upon it, though the party died to whom they were awarded. *Price v. Humphreys*, 17 July 1766, is in point, revivor for costs only, plaintiff being dead. Demurrer that costs were not taxed, which Lord Camden over-ruled. In *Ascough v. Townsend*, cor. Bathurst, C. a perpetual injunction against defendant, with costs. Demurrer to a bill of revivor upon plaintiff's death was allowed upon a recent authority in *Scacc.*; but Lord Thurlow thought that case not fit to be followed.

SEC. 7. Cases of Appeal for Costs only.

M. 1730, cor. King, C.
Gould v. Granger, *Moj.* 395.

1. LORD Chancellor in this case allowed an appeal from M. R. for *costs only*, and said, he had known the Lords allow an appeal for *costs only*, though the old practice was otherwise.

10 June 1749, cor. Hardw. C.
Owen v. Griffiths, *Ambl.* 520.
1 *Eq. Abr.* 125. 1 *Vesf.* 250.
Vide *Turner v. Turner*, *Ambl.*
776. *Pitt v. Gage*, 1 *Bro. P. C.*
550.

In *Vezey's* report of this case it is said, The rule that there can

2. An account of rents received having been decreed against the defendant, who was in possession under an *elegit*, and it appearing on the account that the defendant had received upwards of 90*l.* more than was due to her, it was ordered at the

Rolls

Rolls that she should pay costs. From this order defendant appealed generally, but the only reason for the appeal was the costs, and Lord *Hardwicke* reversed the decree as to them.

be no appeal for costs only, is not to be strictly adhered to, if a sound distinction can be made as where a fair incumbrancer is decreed only his principal and interest.

3. There shall not be a rehearing or appeal for costs only, unless on very special circumstances.

Vide Owen v. Griffith, 1 Vef. 250.

P. 1782, cor. Thurlow, C.
Wirdman v. Kent, 1 Bro. Ch. Ca. 140. 1 Eq. Abr. 125.
Cooper v. Scott, 19 Nov. 1757.

SEC. 8. In what Cases Interest shall be allowed on Costs.

1. A Mortgagee enters, and the profits are not sufficient to answer the interest, yet the arrears shall not carry interest, but the costs and charges must.

T. 1700, cor. M. R.
Proffor v. Cooper,
Pres. in Ch. 116.

2. No interest to be allowed for costs.

6 Feb. 1719, cor. Parker, C.
Bulter v. Burk,
14 Vin. Abr. 458. pl. 9. 2 Eq. Abr. 530. pl. 7.

3. There is no instance of the court's computing interest on costs, except in case of a mortgage.

29 July 1752, cor. Hardw. C.
Bickham v. Croft, 2 Vef. 471.

Court, Inns of.

C—o

Of the internal and domestic Jurisdiction of the Benchers, and of the Power of a Court of Equity over them.

1. Plaintiffs as representatives of *H. H.* brought their bill against defendant as executor of *J. B.* (late a bench) to redeem a mortgage of chambers made in 1687, and by assignment transferred to *J. B.* The term mortgaged was a building term, viz. 57 years expiring in 1731, and the bench gave a new and further term of 11 years to *J. B.*, who though the first person in possession under the mortgage, had not been in possession for 20 years, so that the plaintiffs came within the time. They first petitioned the bench to be admitted to redeem, and an order of pension was made, reciting that the dispute between the parties was

H. 1728, cor. M. R.
Rakestraw v. Brewer,
2 P. Wms. 511.
Sel. Ca. in Ch. 55. Mosf. 189.
2 Eq. Abr. 162. pl. 16.
601. pl. 30.

(a) *Vide* *Rex v. Gray's-Inn*,
Doug. 340.

was matter of account which the bench could not take, wherefore the plaintiffs might seek their remedy in equity. Plaintiffs then brought their bill. Objected, that in chambers in an inn of court, the students were to enjoy quiet without disturbance, and that the courts at *Westminster* had always declined to interpose (a);—that the legal estate of all chambers was in trustees;—that the order of pension which granted terms in chambers, passed no legal estate, nor were the benchers who made such order seised of the legal estate; and that though a bill to foreclose might be proper, supposing plaintiff to have a legal title, yet plaintiffs in this case could not have it, being daughters of the mortgagor, who were not capable of holding chambers. M. R. would not have meddled with the title to the chambers, which was no legal one, if the benchers had not recommended the plaintiffs to go into equity. Defendants have urged, that the additional term of 11 years was granted to *J. B.* as a brother bencher in pure favour, and that it would probably have been denied to the plaintiffs who (as women) were incapable of taking. Perhaps if an old term had come from a member to executors who were not members, they might have had a reasonable time to dispose of it, but no instance can be given where one not a member had a chamber by original grant. His Honor said, this additional term came from the old root, and was subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily from their being possessed of unexpired terms. His Honor decreed a redemption (b), which decree was affirmed by Lord King in *July* 1729.

(b) Upon the same principle are the cases of *Keech v. Sandford*, 2 Eq. Abr. 741. *Tufter v. Marriot*, Ambl. 668. *Rawe v. Chichester*, Ambl. 715. *Owen v. Williams*, Ambl. 734. *Lee v. Lord Vernon*, 7 Bro. P. C. 432. *Pickering v. Vowles*, 1 Bro. Ch. Ca. 197.

T. 1787, cor. Thurlow, C.
Cunningham v. Wegg & al.
2 Bro. Ch. Ca. 241.

2. Bill by a member of *Gray's-Inn* against the treasurer, benchers, and stewards, for an account of monies paid for the renewal of grants of chambers, and that the society might be decreed to renew the plaintiff's term. Plaintiff stated the steward's assurance that he might renew from 8 years to 8 years, on payment of certain fines, and that the benchers had notwithstanding made pension-orders that persons not renewing within a certain time should pay additional fines, and that he had tendered the former fines, which were refused. Defendants

pendants pleaded that *Gray's-Inn* was a voluntary society governed by benchers, who make rules for the regulation of the society and the letting, &c. of the chambers, *subject to an appeal in case of disputes to the Lord Chancellor and the twelve Judges.*

Per Lord Chancellor—The plea is good. There is no instance of a suit either relative to the discipline or the property of chambers in an inn of court. Defendants say, as far as they have acted they are liable to the jurisdiction of the Judges. It is a lien among persons having privilege, therefore Chancery is not the proper jurisdiction. Plea allowed.

Vide Keb. 135. —Boorman's case, Mar. 177. *Rakestraw v. Brewer*, 2 P. Wms. 511. *Hart's case*, Dougl. 340.

Covenant.

C—o

SEC. I. Of Covenants * *real*, which pass a real Estate, run with the Land, or are a Lien upon it—* *Personal*, as annexed to the Person of the Covenantor—* *Inherent*, as tending to support the Thing granted, or collateral to it—* *Executed*, as to Acts already done, or Cases in which a Covenant shall be deemed satisfied or performed —* *Executory*, as to do something *in futuro*—How created; on whom binding; who may take Advantage of them; and of the Relief in Equity for a Non-performance.

* *Note*; The several sorts of Covenants are particularly noticed.

1. *J. S.* bought an estate of *A.* and upon the bargain it was agreed that a recovery should be suffered within three years; and *J. S.* paying his money before the recovery was suffered, took a bond of *A.* that if the recovery was not suffered in three years, that then *J. S.* re-conveying the said lands should be repaid his money. *A.* tendered a recovery; but before it was suffered, a third person made a title to the land, and thereupon

Executory.
P. 1676, cor. Finch, C.
Serjeant Moyard's Case,
2 Freem. Rep. 42.
2 Eq. Abr. 678. pl. 1.

upon *J. S.* exhibited his bill to have the money repaid. But Lord Chancellor said, he could give no relief (a).

(a) For here *J. S.* hath parted with his money, and taken a bond for repayment of it, if the recovery were not suffered in three years' time, *J. S.* re-conveying his estate; and here the recovery being suffered, he hath no pretence by his own agreement to have it repaid; and this court cannot help him, unless it should take upon itself, where any man had a bad bargain, or was cheated in his title, to help him to his money again; and here being no manner of fraud or surprise in the case, if he be not helped by his covenants he shall not be helped in equity; but for the matter of re-conveying, his lordship held, that if *J. S.* should re-convey such title as he had from them, be it more or less, or none at all, yet being a relative re-conveyance, it would have been well enough; but here the recovery being suffered according to the agreement, though nothing passed by it, he held the party had well-performed his agreement; and so no re-conveying or re-payment of the money to be made. Ibid.—In this case of Serjeant Maynard, it was said *per Mr. Attorney-General*, (and seems to be admitted,) that if a man sells another's land, and covenants to discharge it of such particular incumbrances, and before the payment of the money other incumbrances are discovered, this will prevent any suit for the money till all the incumbrances are discharged. Ib. 2.—And if there be no covenants against any incumbrances, yet, if before payment of the money any are discovered, the party may retain his money till they are cleared; *per Mr. Keck*, and agreed to *per Lord Chancellor*. But it was said by Sir J. King, and not denied *per cur.* that those must be incumbrances made by the vendor himself, or otherwise the party cannot detain the money, unless they be covenanted against. Ib. 2.

Inherent.

H. 1683, cor. North, C. S.
Lady Speake v. Lady Speake,
1 Vern. 217.

2. A man covenanted that lands settled for a jointure were 400*l.* *per annum*; the jointure being deficient, decreed, the heir should make good the covenant in specie.

Note; If *A.* covenants under a power to limit several estates, being of a particular value, in jointure, and there is no covenant that they are and shall continue of that value, or to make up the value, it seems that a defect in value shall not be supplied. 2 Eq. Abr. 659. MS. note.

Inherent.

M. 1684, cor. North, C. S.
Johnson Executor of Hill v. Nott,
1 Vern. 271.

3. If an heir sells a reversion in the life of his father at an under value, a court of equity will not decree him specifically to perform a covenant for further assurance. The court in this case dismissed the bill, and left the plaintiff to his remedy at law.

Executory.

H. 1686, cor. Jeffries, C.
Lord Hollis v. Lady Carr & al.
1 Vern. 431.

4. One decreed his lands for payment of his just debts. The testator while a student at Cambridge had been by surprize prevailed upon to give a covenant to pay his sister's portion, and afterwards contested it, yet decreed this to be a debt to be paid within the general provision, together with interest.

Vide Norden v. Norden, 1 Vern.
242.

Non-performance.

M. 1687, cor. Jeffries, C.
Cann Bart. v. Cann Widow,
1 Vern. 480.

5. *A.* on the marriage of his son covenanted to purchase lands, and settle them to the use of his son for life, remainder to the heirs male of his body. The son died, leaving issue a son, who brought a bill against the executor of *A.* for a performance of this covenant. Bill dismissed, in regard the plaintiff's father was executor of *A.*, and might and probably did satisfy himself of the breach of this covenant; and he would have been tenant in tail.

§ 1. *Several Sorts of, how created, &c.*

C—o 385

tail of the estate had been settled, and might have barred it; (as he did by fine of such part of the lands as were settled, and devised them to a son by his second wife).

6. Upon a bill for a specific performance of a covenant with *A.* for the benefit of *B.*, *A.* must be a party. *Secus*, if it had been only a promise, for then either *A.* or *B.* might have brought their action at law.

Non-performance.
H. 1688, cor. Jefferies, C.
Cooke v. Cooke, 2 Vern. 36.
1 Eq. Abr. 73. pl. 8.

7. Though a covenant to stand seised of lands to be after purchased be void at law, unless there be some new act to be done, yet it seems that a covenant to settle lands of such a value will charge after purchased lands, though the covenantor had none at the time of executing the covenant.

Executory.
P. 1689, Canc.
Took v. Hastings, 2 Vern. 97.
1 Eq. Abr. 27. pl. 3. 31. pl. 3.
In *Deacon v. Smith*, 3 Atk. 229. Lord Hardwicke said, this case was only a *dictum*, and not to be relied on—on searching the

register-book it did not appear whether the estate was purchased before or after the covenant.

8. Bill for a specific performance of a covenant, whereby the plaintiff was to have a pit in the defendant's ground for digging black stones. Proved, that the defendant and those under whom he claimed had been in possession of a pit there above 60 years. Bill dismissed.

Non-performance.
H. 1690, cor. Lds. Comrs.
Scalesfield v. Whitehead,
2 Vern. 127.

9. Baron and feme grant a watercourse through the feme's land, with covenant for them, their heirs and assigns, to cleanse and keep it in repair, and to suffer a common recovery to establish the grant. Decreed, this is not a personal covenant as to the baron and feme, but a covenant which runs with the land, though made by a feme covert, and shall bind the assignees, being strengthened and made good by the recovery.

Real.
H. 1691, Canc.
Holmes v. Buckley,
Prec. in Ch. 39.
1 Eq. Abr. 27. pl. 4.

10. *H. B.* settled lands to the use of himself for life, and then as to part to his wife for her life for her jointure, then to the issue male of his own body, with remainders over, and a proviso, that if he should have any younger children, he should by deed or will appoint any of the lands (except those in jointure) as he should think fit for raising 500*l.* a-piece for such younger children, to be paid as he should declare, and covenanted to do so accordingly. *H. B.* died, leaving several younger children, but did not make any appointment. Decreed this a charge upon the land, and should bind the issue in tail, and ordered the 500*l.* a-piece to be raised for the younger children immediately. *Note:* The

Real.
1695, cor. Somers, C. S.
Dr. Sarib, or Garth, v. Lady
Blanfrey,
Gilb. Eq. Rep. 166.
2 Eq. Abr. 659. c. 1.

covenant in this case was looked upon as an execution of the appointment in pursuance of the power.

Executory.

H. 1698, cor. Somers, C.
*Earl of Warrington v. Sir James
 Longham*, Prec. in Ch. 89.
 1 Eq. Abr. 132. pl. 14.
 1 P. Wms. 107. cited.
Vide Collins and Plummer,
 1 P. Wms. 106. *Bosvil v. Bran-*
der, 1 P. Wms. 460. *Flight v.*
Cook, 2 Vef. 619.

Real.

T. 1700, Canc.
Lady Clifford v. Earl of Burling-
ton, 2 Vern. 379.

All the cases go upon this ground, that whatever is covenanted to be done is considered as done; per Lord Hardwicke, in *Marchioness of Blandford v. Duke of Marlborough*, 2 Atk. 545. The ruling case in this respect is *Coventry v. Coventry*, 2 P. Wms. 222. Max. in Eq. 19. Gilb. Ch. 285. Gilb. Eq. Rep. 160. 1 Eq. Abr. 348. 2 Eq. Abr. 87. pl. 9. 660 pl. 3. 673. pl. 9. 9 Mod. 12. 10 Mod. 463. Powell on Pow. 170. Com. Rep. 312. 1 Stra. 596.

Inherent.

M. 1700, Canc.
Napper v. Lord Allington,
 1 Eq. Abr. 160. pl. 4.

Inherent.

3 Dec. 1701, cor. Wright, C. S.
Ormsby v. Dodswell,
 16 Vin. Abr. 454. pl. 7.
 2 Eq. Abr. 658. pl. 3.
 Upon appeal to the Lords,
 25 Jan. 1702, this decree was affirmed. 1 Bro. P. C. 20.

11. *A.* covenants in marriage articles to pay 10,000 *l.* within six months after his death; and after growing old and infirm, and having married a 4th wife, under whose influence he was pretended to be, the covenantee would have obliged him to pay the money presently, on an allowance for the interest, or give better security to pay it when due; but the court held, that they could not alter this agreement of the parties, or make it better than they themselves had.

12. *A.* tenant for life, with power to make a jointure of 1000 *l. per annum* upon marriage, covenanted to make a jointure on his wife of 1000 *l. per annum*. *A.* afterwards gave a particular of lands mentioned to be 1000 *l. per annum*, which were settled for the jointure, but they proved to be but 600 *l. per annum*. Upon a bill to have the jointure made up 1000 *l. per annum*, decreed to be so made up by the issue in tail, though not privy to the marriage treaty, or guilty of fraud.

13. The estate of *A.* was decreed to be sold for payment of debts and legacies, and that all parties interested should join in the sale. *J. S.* was the purchaser of the whole, being 2000 *l. per annum*, and a conveyance was made to him with a covenant for further assurance. *J. S.* sold off 1600 *l. per annum*, and delivering over the title-deeds to the purchaser, so that he was left without a title to the remaining 400 *l. per annum*; he therefore moved that the parties who conveyed to him should execute a duplicate deed, which the court ordered, considering it within the covenant for further assurance, and directed it to be indorsed as a duplicate, but the court being moved again, the order was discharged, for that the decree being once executed, the court had no more to do with it.

14. A father upon his son's marriage settled lands which he covenanted to be 800 *l. per annum*, and reserved power to himself to charge 1200 *l.* for his younger children. He charged the estate with 600 *l.* only, and died. The son objected to the payment

payment of the 600*l.*, because the value of the lands was defective, being only 60*l.* a-year, which ought to be made 800*l.* a-year before the charge should take effect. But decreed, that the money was well charged, the father having only charged a moiety of the 1200*l.*; and in case there were a deficiency, he ought to sue for satisfaction out of his father's estate for the breach of covenant.

15. *A.* on the marriage of his son covenanted for himself, his executors and administrators (without naming his heirs) to settle lands (*a*) of 150*l.* *per annum* value on his son and the issue of his marriage, but died before any settlement made. The son as heir at law entered on his father's estate, and settled it for the jointure of a *second* wife, who had no notice of the articles. Decreed, that although no land was mentioned in the articles, yet the covenant should be a lien upon the land of the covenantor, unless he had purchased and settled other lands within the time limited, and which were not settled on the *second* wife, who came in as a purchaser without notice.

16. *A.* covenanted on his marriage to purchase lands of 200*l.* *per annum*, and settle them for the jointure of his wife, and to the first, &c. sons of the marriage. He purchased lands of that value, but made no settlement, and on his death they descended to his eldest son. On a bill by the eldest son for a specific performance, decreed, that the lands descended were a satisfaction of the covenant.

17. By a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife; and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to those limitations. *A.* afterwards suffers a recovery, and devises these lands. On a bill for a specific performance of the covenants, it was decreed that the lands devised were not affected, though the covenant was good to bind the assets; and such covenant being at first accepted, equity ought not to vary or alter it.

A man on his marriage makes a settlement, whereby the lands were limited in remainder, after his and his wife's death, to the heirs of his body begotten on his wife; and covenants not to bar the entail or suffer a recovery; and having one daughter,

Real.

H. 1704, cor. Cowper, C. S.
Roundell & Un. v. Breary,
2 Vern 482.

(a) In Deacon v. Smith,
3 Atk. 329. Lord Hardwicke said, this was only a covenant to settle lands; but that a covenant to convey and settle is much stronger.

Executed or satisfied.

T. 1706, cor. Cowper, C. S.
Wilcocks v. Wilcocks,
2 Vern. 558.

Non-performance.

H. 1708, cor. Cowper, C.
Collins v. Plummer,
1 P. Wms. 107. Gilb. Ch 252.
2 Eq. Abr. 36. pl. 1.
T. 1718, cor. M. R.
Bosvil v. Brander, 1 P. Wms. 461.
Vide Lord Warrington v. Sir
Stephen Langham, Prec. in Ch.
89.

Collins v. Plummer.
as stated in 2 Vern. 635.

ter, to whom on her marriage he had given a good portion, he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the court would not decree it, but left the party to recover damages at law for breach of the covenant.

Executory.
T. 1708, cor. Cowper, C.
Vane v. Lord Bernard,
Gilb. Eq. Rep. 6.
2 Eq. Abr. 514. pl. 1.

18. Where there were articles, and in them a covenant, to covenant in the conveyance, that the lands were free from incumbrances, Lord Chancellor Cowper said, this is not a covenant that the lands are free, but only that in the conveyance he would covenant so; but in the case of such a covenant, if any incumbrance is discovered between the executing the articles and sealing the conveyance or deed of settlement, whereof the party had no notice, that incumbrance shall be discharged even before the sealing of the deed of settlement, both as the concealment is a fraud, and because it would be needless to enter into a covenant, which, before entering into, is already known to be broken, but against all other incumbrances discovered afterwards there is the party's covenant only.

Personal.
M. 1709, cor. Cowper, C.
Robinson v. Stephens,
2 Salk. 616, 617.

19. If one covenants to pay an annuity to J. S., the covenantor shall not deduct for taxes, for the charge is on the person of the covenantor and not the land.

Executory.
1709, cor. M. R.
Alford v. Alford,
Gilb. Rep. in Eq. 167.
2 Eq. Abr. 659. pl. 2.

20. A. tenant for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to C., with a power to B. after A.'s death without issue to make a jointure. B. marries in the life of A., and before marriage covenants to make a jointure, and to execute this power when he should come into possession. A. dies without issue male, and B. survives, but dies without making a jointure, or executing this power. B.'s widow brought a bill against C. to have a jointure made, because B. surviving A., he might have executed this power, and had covenanted so to do; and decreed accordingly.

In this case (*Alford v. Alford*), as stated by P. Wms. 2 Vol. 231. a material fact is omitted; it is better reported in *Strange* 604. *Vide* what is said of this case in *Jackson v. Jackson*, 4 Bro. Ch. Ca. 466.

Vide also *Hollingshead v. Hollingshead*, cited in *Coventry v. Coventry*, 2 P. Wms. 230. which is a strong case to shew how far the court will go in execution of powers—*et vide* what is said of that case in *Jackson v. Jackson*. The cases of *Alford v. Alford*, and *Hollingshead v. Hollingshead*, are stated in 4 Bro. Ch. Ca. 466. from the register's book.

Where binding.
M. 1714, cor. Cowper, C.
Tate v. Austin, 1 P. Wms. 264.

21. A husband borrows money, and he and his wife levy a fine of the wife's land as a mortgage for

§ 1. *Several Sorts of—how created, &c.*

C—o 389

for it. The mortgage shall be paid out of the husband's personal assets (if sufficient), he having covenanted to pay the mortgage-money and interest, and thereby undertook to discharge his wife's estate: but all the husband's debts, though by simple contract, shall be preferred to the mortgage.

150. 2 P. Wms. 664. (n.) Lord Kinnoul v. Money, cited 3 Bro. Ch. Ca. 206. Clinton v. Hooper, 3 Bro. Ch. Ca. 201. Parteriche v. Powlet, 2 Atk. 384. Lacam v. Mertins, 1 Vef. 313.

22. In this case Lord Cowper seemed to be of opinion, that in case of a covenant to convey land, the money being paid, a judgment confessed to a creditor, between the time of the covenant and the conveyance, should not affect the purchaser, because in equity the land is esteemed to be sold from the time of the covenant.

yet this judgment shall not in equity affect the estate, because from the time of the articles, and payment of the money, the vendor would be only a trustee for the purchaser. Said arg. and admitted, and affirmed *per* Lord Chancellor Cowper, T. 1715, in the case of Finch and Earl of Winchelsea. 1 Will. Rep. 278.—But articles made for a valuable consideration and the money paid, will in equity, bind the land and prevail against a judgment creditor *mesne* betwixt the articles and the conveyance; but this must be where the consideration paid is somewhat adequate to the thing purchased; for if the money paid is but a small sum in respect of the value of the land, this shall not prevail over a *mesne* judgment creditor. *Per* Lord Chancellor Cowper. Ib. 282.—But a mortgagee for a valuable consideration, and without notice of such covenant, shall hold place against such covenant; for, in this case, the money is lent upon the title and credit of the land, and attaches upon the land; but it is not so in the case of a judgment creditor, who (for ought appears) might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, and not a specific lien upon the land. Said arg. and admitted. Ib. 279.

23. *D.* having more than 3000*l.* *per annum*, married *M.* who had 10,000*l.* portion, and settled 1000*l.* *per annum* upon her for her jointure, and the greatest part of *D.*'s estate was settled upon the first and every other son in tail male successively. *D.* run greatly in debt, and *J.*, his eldest son, being of full age, *D.* upon a calculation of his debts, and the value of his estate for life, with impeachment of waste, agreed with *J.* to convey all his estate to him; and *J.* covenants to pay all *D.*'s debts, and to allow him 500*l.* *per annum* rent-charge for his life; and further, (upon which the question arises,) that *J.* should indemnify *D.* from all debts, charges, and expences for the maintenance of *M.* his mother, she being then separate from *D.* by consent. *M.* brings a bill against *D.* and *J.*, the son, to have an allowance for her maintenance. The son, by his covenant, has taken upon himself the charge of maintaining *M.* and stands in the husband's place, who is bound to give his wife an allowance, if he voluntarily separates from her; and the son must be taken to be in nature of a trustee for the wife, so

Cc 3

far

2 Vern. 689.

1 Eq. Abr. 62. pl. 5.

Vide Lord Huntingdon's case,

2 Vern. 347. 1 Bro. P. C. 1.

Robinson v. Gee, 1 Vef. 252.

Pocock v. Lee, 2 Vern. 604.

Bagot v. Oughton, 1 P. Wms.

347. Lewis v. Nangle, Ambl.

Clinton v. Hooper,

1 Vef. 313.

Executed,

1715, Canc.

Peach v. Winchelsea,

10 Mod. 468.

2 Eq. Abr. 683. pl. 3.

If one article to buy an estate, and pays his purchase-money, and afterwards the vendor acknowledge a judgment or statute to a third person, who had no notice,

Where binding.

T. 1715, cor. Cowper, C.

Dutton v. Dutton & al.

4 Vin. Abr. 178. pl. 18.

2 Eq. Abr. 250. pl. 7.

far as a reasonable allowance for her maintenance: and though the son offered to take her to his house, yet she is not bound to accept that offer; for though he stands in the place of the husband as to her maintenance, and a husband is not bound to allow any thing to his wife for maintenance, if he offers to take her home; yet in this case no such obligation lies upon the wife to live with the son; and though she refuses, she ought to have a reasonable allowance. *Per Cowper, C.* who ordered her to be allowed 200*l.* per annum.

Mr. Viner says Lord Cowper allowed the wife to keep the plate, &c. which she bought, or was given to her by her friends during the separation.

Executory.

T. 1715, cor. Cowper, C.
Finch & al. v. Lord Winchelsea,
1 P. Wms. 277.

Vide Freemount v. Dedire, 1 P. Wms. 429. Coventry v. Coventry, 2 P. Wms. 222. S. P.

(a) But a bona fide purchaser, without notice of such a covenant, cannot be affected by it.

Executed or satisfied.

T. 1716, cor. Cowper, C.
Blandy v. Widmore,
1 P. Wms. 324.

2 Vern. 709. Gilb. Ch. 327. 2 Eq. Abr. 352. pl. 11.

(a) This case and that of *Lee v. D'Aranda*, 3 Atk. 419. and 1 Ves. 1. have been considered rather as cases of actual performance than of satisfaction of covenants, *vide* *Barret v. Beckford*, 1 Ves. 520. *Prime v. Stebbing*, 2 Ves. 411.—In the cases on the subject of satisfaction, in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of performance. *Vide* *Eastwood v. Vinke*, 2 P. Wms. 616.—In cases of satisfaction the presumption will not hold where the thing substituted is less beneficial (either in amount or certainty, or time of enjoyment, or otherwise) than the thing contracted for, since satisfaction implies the doing of something equivalent, and the presumption is so much weakened where the thing substituted is not equivalent to the thing contracted for, that a part satisfaction will not be intended; whereas in cases where the thing done can be considered as a part performance of the thing contracted for, it shall be so taken.—As in covenants to settle lands of a certain value, the subsequent purchase by the covenantor of lands of a smaller value, (which are at his death left undisposed of,) shall be intended to be a part performance of such covenant, as it may be presumed he meant to purchase more lands afterwards, and settle the whole according to the covenant. *Lechmere v. Lord Carlisle*, 3 P. Wms. 211.—In the case of *Lee v. D'Aranda*, as well as in the principal case, the distributive share amounted to more than the money provided by the covenant; for the personal estate (according to *Atkins*) was 2300*l.* of which the widow was entitled to one moiety, the next of kin being brother and sister of the intestate, (as appears by the register-book,) and not his children, as mentioned in the report. These, therefore, were not in fact cases of a part performance only; but the language of Lord Hardwicke in *Atkin's* report of *Lee v. D'Aranda* seems to apply to a part performance as strongly as to a full performance of the contract. But on this head see more in *Haynes v. Micoe*, 1 Bro. Ch. Ca. 189. *Kirkman v. Kirkman*, 2 Bro. Ch. Ca. 95. *Rickman v. Morgan*, 2 Bro. Ch. Ca. 394.

Inherent.

P. 1717, cor. Cowper, C.
Bagot v. Oughton,
1 P. Wms. 247. *Forbes*, 332.
8 & 9 Mod. 249. 381.

(a) *Vide* *Tate v. Austen*, 1 P. Wms. 264. *Lewis v. Nangle*,
Ambl. 150. *Clinton v. Hooper*,
3 Bro. Ch. Ca. 201.

26. A covenant to pay mortgage money is not suable in equity unless the covenantor receives the money (a), as where a feme sole, seised of land subject to a mortgage marries B., who on an assignment of the mortgage, covenants to pay the money and dies. B.'s personal estate is not liable in equity to pay it, in regard the debt was originally

nally the debt of the mortgagor (*b*); and the covenant of *B.* is only an additional security given on transferring the mortgage.

(*b*) *Vide Evelyn v. Evelyn*,
2 P. Wms. 659. *Howel v. Price*,
1 P. Wms. 294. (n.)

27. *A.* seized of copyhold lands, which, by the custom of the manor, could only pass by deed, surrender, or admittance, granted and conveyed those lands to his natural daughter in consideration of 300*l.* paid by her. The daughter was admitted, but no surrender was made of the lands as required by the custom. At the foot of the admittance was a proviso that *A.*, the reputed father, should enjoy the lands for his life; and in the deed there was a covenant for further assurance: yet, for want of a surrender according to the custom, this was agreed to be a defective conveyance. Upon a bill against the heir at law to supply the defect and to have further assurance, the only question was, If the court could supply the defect in favor of a natural daughter? For the daughter it was urged that she was a purchaser, but the payment of the 300*l.* was not proved. The subsequent marriage of plaintiff's mother with her reputed father (*a*) was also urged, but not proved. It was insisted also, that by the law of nature the father should provide for his child, and that the defect ought to be supplied in equity, especially as there was a covenant for further assurance. Objected, that though the law of nature did oblige the reputed father to provide for his bastard child, yet equity was under no such obligation; and it never was attempted to supply the defect of a voluntary conveyance in favor of a stranger against an heir at law. The plaintiff is a stranger, *nullius filius*, and all the father's affection is not sufficient to raise a use at law, nor can a covenant for further assurance help a conveyance void in itself, for the covenant goes along with the estate. Besides, this being a copyhold estate could not be affected by a judgment, much less by a covenant that would not bind the heir of the copyhold (*b*). The court being of the same opinion, dismissed the appeal from the rolls (*c*); and as to the proviso at the foot of the admittance, it was held repugnant and void according to a case in *Cro. Car.* or

1 Ves. 582. and *Elton v. Elton*, 3 Atk. 508.—But Lord Chancellor, in the principal case, was not satisfied with the difference; and said that by the statute of 43 Eliz. a man was bound to provide for his grandchildren.

(*c*) *Vide Watts v. Bullas*, 1 P. Wms. 61. where the M. R. said a devise of a copyhold without a surrender ought to be made good for grandchildren as well as children.

Inherent.

M. 1717, cor. Cowper, C.
on appeal from the Rolls.
Fursaker v. Robinson,
Proc. in Ch. 475.
Gillb. Eq. Rep. 139.
1 *Eq. Abr.* 123. pl. 9.
Vide Gillb. Ch. 256. *Randall*
v. Randall, 2 P. Wms. 465.
Fairbeard v. Bowers, 2 Vern. 202.
Proc. in Ch. 17.

(*a*) Although it was admitted the daughter was a bastard at common law, notwithstanding the subsequent marriage, yet it was insisted the maxim of the civil law ought to prevail, *quod matrimonium subsequens tollit peccatum procedens*.

(*b*) In *Kettle v. Townsend*, 1 Salk. 187. it was held that a man was not obliged to provide for his grandchildren, as he was for his children, the latter being a debt of nature, but not the former: *et vide Tudor v. Anson*,

in the principal case, was not satisfied with the difference; and said that by the statute of 43 Eliz. a man was bound to provide for his grandchildren.

(d) This seems to be the case *Cro. Jac. (d)* and the distinction taken in *Kite v. of Joiner v. Lambert*, 2 Cro. 36. *Quinton*, 4 Co. 45.

Real.

P. 1718, cor. Parker, C.
Freemount v. Dedire,
 1 P. Wms. 429.
 2 Eq. Abr. 37. pl. 2. 257. pl. 7.
 (a) *Vide Finch v. Lord Win-*
chelsea, 1 P. Wms. 277. *Conven-*
try v. Coventry, 2 P. Wms. 222.
 (b) *Williams v. Lucas*, H. 1789,
 in Scacc. 1 P. Wms. 430. (n.)

28. One covenanted before marriage to settle certain lands on his wife for life, and afterwards devised those lands for payment of his debts. The covenant is a specific lien on the lands (a) *secus* of a covenant to settle lands of 60*l.* per annum value, without mentioning any certain lands, for in such a case the wife can only come in as a specialty creditor (b).

Non-performance.

9 Mar. 1719, Dom. Prdc.
Stafford & al. v. City of London,
 2 Bro. P. C. 134.
 4 Vin. Abr. 402. c. 21.
 6 Vin. Abr. 472. c. 10. 2 Eq. Abr. 244. c. 18.

29. Whether a party has broken any of his covenants or not, is a matter properly triable at law; as the damages (supposing a breach) cannot be settled without such trial.

Executory.

T. 1719, cor. Parker, C.
Pinbury v. Elkin, 1 P. Wms. 566.
 2 Vern. 758. 766. *Pres. in Ch.* 483. 2 Eq. Abr. 346. pl. 9. — *Vide Pleydel v. Pleydel*, 1 P. Wms. 750.

25. A covenant to pay a sum of money on failure of issue of A. generally is good.

Executory.

T. 1722, cor. Parker, C.
Lewis v. Lord Lechmere,
 10 Mod. 505.
 2 Eq. Abr. 689. pl. 9.

30. A covenant to make such a title as vendee's counsel shall approve, means no more than that the plaintiff should make out a good title; for if the counsel disapprove of a good and clear title, (*i. e.* such a one as a court of law or equity would take to be a good title) yet the vendee will be bound by his bargain.

Upon mutual articles there ought to be mutual remedies, and therefore the vendor may come into equity for a specific performance as well as the vendee; and Lord Chancellor Parker was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance. 1*b.* 506. in S. C.

That Chancery will not relieve against a covenant where, on the performance or non-performance of the act to be done or omitted, the party is to pay a sum by way of liquidated damages. *Vide Small v. Fitzwilliam*, *Pres. in Ch.* 102. *Woodward v. Giles*, 2 Vern. 119. *East India Company v. Blake*, *Finch* 117. *Ponsonby v. Adams*, 6 Bro. P. C. 417. *Rolfe v. Patterson*, 6 Bro. P. C. 470. *Lowe v. Peters*, 4 Burr. 2228. *Legarde v. Hodges*, 3 Bro. Ch. Ca. 534; and that the court will relieve where the penalty is intended merely to secure the enjoyment of a collateral object. *Vide Slowman v. Walker*, 1 Bro. Ch. Ca. 418. *Hobson v. Trevor*, 2 P. Wms. 191. *Parker v. Wilson*, 10 Mod. 517. *Chilliner v. Chilliner*, 2 Vef. 528.

Non-performance.

T. 1723, cor. Macclesfield, C.
Defcarlett v. Dennet,
 9 Mod. 23.

31. A bill in Chancery will not lie to be relieved against a wilful or voluntary breach of covenant or condition.

On whom binding.

T. 1723, cor. M. R.
Steed v. Cragb,
 2 Eq. Abr. 37. pl. 3.
 9 Mod. 42.
Vide Anon. Poph. 4. *Grute v. Locroft*, *Cro. Eliz.* 287. *Har-*
bon v. Barton, Mo. 397. *Norden v. Lover*, 1 *Freem.* 442. 1 Eq. Abr. 240. 2 *Jon.* 88. 2 *Lev.*

32. A long term of years being vested in the husband in right of his wife, he made an under-lease for 10 years; and, upon borrowing money of the lessee, covenanted to grant him another lease, to commence after the end of the 10 years, and to continue during the time he had any right, but died before he made such lease. Decreed a good

good disposition of the term in equity, and that the covenant was such a lien as bound the right in any other hands. 189. Oglander v. Bafton, 1 Vern. 396. 1 Eq. Abr. 69.

husband's widow, should be obliged to carry this covenant into execution, but that the court would declare it to be a good disposition of the term in equity, and thereupon grant an injunction against the defendant, who had brought an ejectment.—*Note* also; that the widow did not claim either as executrix or administratrix, but by virtue of that right which she had paramount to that of her husband; and therefore demurred to the bill, suggesting that if there were any such covenant, it was only a bare agreement between the parties, and rested in covenant, which could only charge the executors or administrators of the covenantor, and that the bill might be dismissed with costs—but decreed as above.

33. Tenant for life, with power to make a jointure, remainder over, covenants to make one of certain lands in consideration of a marriage portion, but dies before a complete execution of the power according to his marriage articles. The remainder-man was decreed to perfect it. Held also that the remainder-man had no equity to have the lands exonerated out of the personal assets of the covenantor.

Vide Finch v. Lord Winchelsea, 1 P. Wms. 277. Freemoult v. Dedire, 1 P. Wms. 429. et post. tit. Ca. 466. and what is there said respecting the cases of Hollinghead v. Hollinghead, and Alford v. Alford, cited in the principal case.

34. A. the father and B. the son, on the marriage of B., covenanted to settle land on B. and his wife for their lives, remainder to their issue, remainder to a nephew in fee. The husband and wife died *sans* issue. If the father and son had an interest in the land, the nephew may compel a specific performance of the covenant. *Secus*, if the father had the sole interest; the limitation to the nephew being *voluntary*, and not supported by the consideration of that marriage or of the marriage portion.

73. Itell v. Beane, 1 Vef. 216. Roe v. Mitton, 2 Willf. 356.

35. Plaintiff sold defendant a copyhold estate of 16*l.* per ann. value, (on which was timber of 150*l.* value) for 630*l.* and covenanted to surrender on or before Michaelmas then next. Defendant paid 10*l.* earnest, entered on the premises and cut down timber, stocked the land, and acted as owner. On a bill for a specific performance of covenants plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before Michaelmas, and attended accordingly. On defendant's part it was proved that he was disordered in his senses; and, though there was no proof of the timber's value,

Real.

P. 1724, cor. Macclesfield, C. cum assit.
Dowager Lady Coventry v. Earl of Coventry & al.
2 P. Wms. 222. Gilb. Ch. 285.
Gilb. Eq. Rep. 160.
1 Eq. Abr. 348.
2 Eq. Abr. 87. pl. 9.
660. pl. 8. 673. pl. 9.
Cam. Rep. 312. 9 Mod. 12.

1 Stra. 596. Fra. Max. in Eq. 19. best reported.

Where binding.

M. 1724, cor. Macclesfield, C.
Osgood v. Strode & al.
2 P. Wms. 245. 10 Mod. 533.
2 Eq. Abr. 25. pl. 26.
Re-heard before King, C. Dec. 1725, and decree for carrying these articles into execution confirmed.
Vide Edwards v. Countess of Warwick, 2 P. Wms. 175. Neeve v. Keck, 9 Mod. 106. Vernon v. Vernon, 2 P. Wms. 594. 4 Bro. P. C. 26. Goring v. Nash, 3 Atk. 186. Stephens v. Trueman, 1 Vef.

Executory.

6 Dec. 1724, cor. King, C.
Edwards v. Heather,
Sel. Ca. in Ch. 3.
2 Eq. Abr. 23. pl. 23.

value, yet as no custom was alleged of the tenant's having power to cut it down, it must have been according to the common law, by which the tenant has no power over it, and therefore a plain imposition. Lord Chancellor was of opinion that it was a great over-value; and that his cutting down timber was a proof of his folly being a direct forfeiture; but said it was a matter merely at law. If the surrender had been made, an action would have laid at law. Bill dismissed.

Where binding.

P. 1725, cor. Lds. Comrs.
Cox & Ux. v. Beluba, Executor,
 2 P. Wms. 272.

Vide Blunden v. Barker, 1 P.
 Wms. 634. Lockyer v. Savage,
 2 Stra. 947. Metcalfe v. Ives,
 1 Atk. 63. Morris v. Burroughs,
 1 Atk. 401.

Executory.

4 May 1725, Dom. Proc.
Ward Esq. v. Duke of Bucks and
others, 3 Bro. P. C. 93.

Personal.

T. 1725, cor. King, C.
Lysons v. Vernon,
Sol. Ca. in Ch. 25.
 2 Eq. Abr. 531. pl. 16.

36. Though it may be a question, Whether the child of a freeman of *London*, upon receiving a suitable portion, may release her orphanage share to her father; yet where such child or her husband covenants to release to the executors after the freeman's death, it is good, and equity will execute the covenant.

37. *A.* brought a bill against *B.* for a specific performance of covenants in a lease, and particularly a covenant to leave a certain quantity of allum upon the premises at the end of the term. The defendant, by his answer, insisted, that this covenant was not intended to be performed; but at the hearing produced a paper, purporting to be a receipt from the lessor for this particular quantity of allum. The court were of opinion, that no regard ought to be had to this paper, not only because it has a suspicious appearance in itself, but because it was not insisted upon in any of the pleadings; and therefore decreed a delivery of the allum.

38. A jointure was made of lands and houses leased out at 17 *l.* per year for five years to come, but worth 108 *l.* per year. The husband covenanted that she (the jointress) should be paid 22 *l.* 10 *s.* quarterly, to make up the present rent 108 *l.* per ann. in case of his dying within the five years. On a bill for payment of several quarters rent and interest, it was insisted that the intent was to put the jointress in as good condition before the rent advanced as if it actually was advanced, but not in a better; and that therefore she should allow taxes for the quarterly payments. But King, C. said, he knew nothing what was the intent; but he saw here a specialty, whereby a man obliges himself to pay so much quarterly, for which he did

§ 1. Several Sorts of—how created, &c.

C—o 395

did not find he paid any taxes, and so could allow none; and this being a personal covenant for payment of a sum of gross, interest must be allowed from the time each respective sum became due.

39. *A.* devised his lands of about 4000 *l.* a year to his son *B.* for life, remainder to his first, and every other son in tail male. *B.* by articles of intermarriage reciting the devise, covenanted to assure lands in fee of 4000 *l.* a year at least, to the use of himself for 99 years, if he should so long live, remainder to his first, and every other son in tail male; the marriage took effect, *B.* died, and suffered the devised lands to go to his eldest son. Decreed that they shall be taken as a satisfaction of the lands covenanted to be assured.

Executed or satisfied.
H. 1729, cor. King, C.
Earl of Tankerville v. Coke & al.
Mof. 167.

40. Covenant, in consideration of marriage, to settle lands on husband and wife, and the issue male of the marriage; remainder to the brothers of the husband. Equity will compel a specific execution of this covenant, and not put the party to an action of covenant in the trustees' name.

Vide Osgood v. Sirode, 2 P. Wms. 245. Goring v. Nash, 3 Atk. 186. Stephens v. Truman, 1 Ves. 73.

Executory.
T. 1730, cor. King, C.
Vernon Esq. & al. v. Vernon,
Widow and Executrix,
2 P. Wms. 594.
Kel. in Ch. 9.
2 Eq. Abr. 23, pl. 33, affirmed in
Dom. Proc. 4 Bro. P. C. 26.

41. If one mortgages lands and dies, his personal estate shall go in ease of the real; but if *A.* seised in fee mortgages his land, leaving *B.* his son and heir, and *B.* dies leaving *C.* his heir, *B.*'s personal estate (*a*) shall not be applied to pay this mortgage, because it was not *B.*'s debt. So, though the mortgage was transferred in *B.*'s time, and *B.* covenanted to pay the money, yet the debt not being originally the debt of *B.* his covenant is only a surety and the land the original debtor, which *C.* shall therefore take *cum onere* (*b*).

Inherent.
H. 1731, cor. King, C.
c.m. assft.
Evelyn v. Evelyn,
2 P. Wms. 664. *W. Kel. 18.*
2 Eq. Abr. 501, pl. 34.
647, pl. 24.
(*a*) *Vide* Cope v. Cope, Salk.
449, 450.

rules on this subject, are so judiciously and accurately selected by Mr. Cox in a note to this case in his edition of P. Wms. Reports, that Sir R. P. Arden, M. R. in *casu* Woods v. Huntingford, 3 Ves. jun. 130. chose rather to refer to Mr. Cox's words than use his own.—See the principal case fully stated, with Mr. Cox's annotations, post, tit. *Estate*.

(*b*) Note; All the authorities of any weight, together with the

42. *A.* covenanted on his marriage to lay out 3000 *l.* in the purchase of land, and to settle it on himself in tail, remainder to *B.* *A.* purchased the manor of *D.* with this 3000 *l.* and never settled it, but suffered a recovery thereof. As this covenant was held a lien on the land, so the recovery suffered by *A.* discharged such lien, and barred *B.* of the benefit of it, and of the remainder.

Real.
H. 1732, cor. King, C.
Manwood Bart. v. Turner Esq.
3 P. Wms. 171.

43. 30,000 *l.*

Executed or satisfied.

M. 1733, cor. Jekyll, M. R.
Lechmere Esq. v. Lord Carlisle
 — & al. 3 P. Wms. 228.
 Ca. temp. Talb. 80.

2 Eq. Abr. 31. pl. 42. (n.)
Vide Deacon v. Smith, 3 Atk.
 323. *Attorney-General v. Whore-*
wood, 1 Vesf. 540. *Davys v. Howard*, 5 Bro. P. C. 552. *Sowden v. Sowden*, 1 Bro. Ch. Ca. 532.

In *Descon v. Smith*, Lord Hardwicke commented on the principal case.—It was laid down by Sir Joseph Jekyll, agreeable to the judgment of three successive Chancellors, (Lords Somers, Cowper, and Harcourt,) that in cases of satisfaction one rule is, that it depends on the intent of the party, and which way soever the intent is, that way it must be taken.—Lord Talbot, on the re-hearing, (Ca. temp. Talb. 92. laid down the same rule with some restriction, as that the thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a less.

Where binding.

18 June 1737, cor. Hardw. C.
 on appeal from the Rolis.
Medcotte Widow v. Ives,
 1 Atk. 63.

(a) *Vide Blunden v. Barker*,
 1 P. Wms. 639. *Cox v. Belitha*,
 2 P. Wms. 273. *Lockyer v.*
Savage, 2 Stra. 947. *Secus* if a
 mere voluntary release, *Morris v.*
Boroughs, 1 Atk. 399.

(b) *Vide Hearn v. Barber*,
 3 Atk 213.

(c) Vide Love v. ———,

1 Vern. 6. *Hancock v. Hancock*,
 2 Vern. 665. *Blunden v. Barker*, 2 P. Wms. 644. *Cleaver v. Spurling*, 2 P. Wms. 527. *Pusey v.*
Desbouvrie, 3 P. Wms. 320. *Morris v. Burroughs*, 1 Atk. 403; 2 Atk. 629. *Read v. Snell*, 2 Atk.
 644. *Hall v. Lumley*, and other cases cited in *Tomkyns v. Ladbroke*, 2 Vesf. 592.

Executory.

15 Dec. 1738, cor. Hardw. C.
Green v. Smith, 1 Atk. 572.
Vide Milner v. Mills, Mosf. 123.
Greenhill v. Greenhill, Prec. in
 Ch. 320. *Lingen v. Sowray*,
 1 P. Wms. 172. 3 P. Wms. 221.

S. C. cited. *Potter v. Potter*, 1 Vesf. 437. *Beauclerk v. Mead*,
 2 Atk. 169. *Oldham x. Hughes*, 2 Atk. 453. *Pullen v. Ready*, 2 Atk. 590. *Whitaker v. Whit-*
aker, 4 Bro. Ch. Ca. 31.—*Vide* also *Guidot v. Guidot*, 3 Atk. 254.—Max. That which is covenanted
 to be done is considered as done.

Where binding.

10 Nov. 1740, cor. Hardw. C.
Fleetwood v. Templeman,
 2 Atk. 79. *Barn*, 187.

43. 30,000*l.* is covenanted to be laid out in land; the money need not be laid out altogether upon one purchase; but if laid out at several times it is sufficient; and if the covenantor dies, having purchased some lands which are left to descend, this will be a satisfaction *pro tanto*.

44. A. and his wife covenant in articles before marriage, in consideration of 2000*l.*, the wife's portion, to release all the right that might accrue to them out of her father's personal estate by the custom of London. The husband is bound by his covenant (a); and though the wife was under age (b), yet it was a matter that accrued to him in her right, and he may release it, and his release will bind her.

The husband's covenanting to release is an extinguishment of the wife's right to the orphanage part; and if so, leaves the estate of the father as if it had never been charged; and, therefore, it must be considered as part of his general personal estate, and not go wholly to the father's executor as a part of the dead man's share (c).

45. If a man covenants to lay out a sum of money in the purchase of lands, generally, and devises his real estate before he has made such purchase, the money agreed to be laid out will pass to the devisee.

46. Husband and wife covenanted by mortgage deed in 1692 to levy a fine in *Easter term* following; the fine was not levied till *Trinity term* 1695; for 10*l.* more they joined in a conveyance of the equity of redemption, and covenanted that the fine theretofore levied should be to the uses of the last deed. Held that the covenant in 1695 was good and binding on the husband and wife, and that

§ 1. Several Sorts of—how created, &c.

C—o 397

that the former deed might be laid out of the case, as the covenant under it for levying the fine in *Easter term* was not strictly pursued (a).

(a) *Vide* Countess of Rutland v. Earl of Rutland, Cro. Jac. 29.
5 Co. 25. Shelley's case, 1 Co. 99. Jones v. Morley, 2 Salk. 677. Carth. 410.

47. As at law an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land, *à fortiori* he may do it in equity.

Real.

2 May 1742, cor. Hardw. C.
Valiant v. Dodomede, 2 Atk. 546.
Vide 2 Stra. 1221. in *Lekeux v. Nash*, where Lee, C. J. grounded his opinion on this and another

similar case in his charge to the jury.—In some sorts of assignments made by tenants, the court has interposed. *Vide* Treacle v. Coke, 1 Vern. 165. Philpot v. Hoare, 2 Atk. 219.

48. An heir is bound to perform his father's covenant, where he is benefited by the contract of his father, though he is neither his personal representative, or claims any part of his real estate, except what was settled upon him in strict settlement, and in which his father had only an estate for life.

Real.

17 May 1742, Dom. Proc.
Cbetwynd Esq. v. Fleetwood & al.
4 Bro. P. C. 435.

49. A bishop by covenanting to pay all charges, ordinary or extraordinary, does not subject himself to the land tax, because he cannot bind his successors. *Secus*, in the case of a common person, because he can bind his heirs.

Where binding.

21 April 1743, cor. Hardw. C.
Marcioness of Blandford v. Dukes of Marlborough & al.
2 Atk. 542.

in which this is cited nomine Bishop of Oxen v. Wye, in Canc. 1698.

50. N. the mother of A. S. was seized in tail *ex provisione viri* of the estate in question, reversion in fee to W. S. the husband of A. S. who was dead. A. S. and her husband W. S. in his lifetime created a mortgage term of 1000 years on his estate, and N. joined in levying a fine to the mortgagee, remainder to such uses as W. S. should appoint, and in default thereof to him and his heirs. W. S. before the levying of the fine on sale of an estate belonging to him, covenants with J. S. the purchaser for quiet enjoyment; and afterwards makes an appointment to trustees for particular purposes of the wife's estate, 1st, by sale of his wife's estate to raise money and pay the mortgage, and the residue for the benefit of his wife and children. J. S. being evicted of the lands he purchased, and N. and W. S. being dead, brings his bill against A. S. the widow and her four children, to subject her estate to the plaintiff's demand under the covenant of W. S. It being a doubtful case whether the plaintiff's debt accrued by breach of covenant, till after the appointment of W. S.

Non-performance.

9 Feb. 1746, cor. Hardw. C.
White v. Sansum,
3 Atk. 410. 412.

in

in execution of the power, Lord Hardwicke dismissed the bill.

The trust created by the husband of the wife's estate would not at law have been deemed fraudulent against creditors; nor even against a subsequent purchaser; and if so, this court will not carry it further.

Voluntary conveyances in general are held fraudulent against purchasers.

Executory.

23 Feb. 1746, cor. Hardw. C.
Lee v. Cox and D'Aranda,
3 Atk. 419. 1 Vef. 1. nomine *Lee*
v. *D'Aranda*.

Vide Blandy v. Widmore, 1 P.
Wms. 324. and Mr. Cox's special
note thereto. *Barret v.*
Beckford, 1 Vef. 529. *Weyland*
v. Weyland, 2 Atk. 632. *Kirk-*
man v. Kirkman, 2 Bro. Ch.
Ca. 95.—With respect to cases
upon satisfaction of portions and
legacies, *vide Bellasis v. Uthwatt*,
1 Atk. 426. and Mr. Sander's
note.

Real.

26 Mar. 1746, cor. Hardw. C.
Deacon Executrix v. Smith Wi-
dow, 3 Atk. 323.
1 Vef. 540. S. C. cited.

(a) *Sic Tooke v. Hastings*,
2 Vern. 97. *Roundel v. Beary*,
2 Vern. 482. *Wilcocks v. Wilcocks*, 2 Vern. 558. *Lechmere v. Carlisle*, 3 P. Wms. 211. 218.
Wilks v. Wilks, 5 Vin. Abr. 293. *Bridges v. Bere*, 2 Eq. Abr. 34. *Lewis v. Hill*, 1 Vef. 274.
Attorney-General v. Whorewood, 1 Vef. 540. *Sowden v. Sowden*, 1 Bro. Ch. Ca. 582.

A covenant to convey and settle lands is stronger than to settle only.

Though the party who is under a covenant to purchase and settle lands dies before he has completed it, that is no reason why it should descend upon the heir at law, and therefore it is right to determine upon what appears to be the intention on presumptive evidence of that intention (b).

(b) This rule seems to have been founded on the judgments of Lords Somers, Cowper, and Harcourt, and established by Sir Joseph Jekyll, M. R. and Lord Talbot in *Lechmere v. Lord Carlisle*, with some restrictions.

R. H.

§ 1. *Several Sorts of—how created, &c.*

C—o 399

53. *R. H.* on his marriage covenanted that he, his heirs, executors, or administrators, should purchase lands of the value of 600 *l. per annum*, and should settle them to the use of himself for life, afterwards in part for a jointure; and the whole upon the issue of the marriage; remainder to his right heirs for ever. *R. H.* purchased lands, which he did not settle according to his covenant, but devised them away. After making his will, he purchased other lands, and died without performing the covenant. Upon a bill by the heir at law against the person entitled to the personal estate to have the covenant performed, Lord Chancellor said he would look into the cases cited (a), and though he must go as far as the precedents, he would not go farther in decreeing a performance. The cause ended by compromise.

Smith, 3 Atk. 328. Blandy v. Widmore, 2 Vern. 709. Wilcocks v. Wilcocks, 2 Vern. 558.

Non-performance.
6 July 1749, cor. Hardw. C.
Lewis v. Hill, 1 Vesf. 274.

(a) The cases cited were *Lechmere v. Lechmere*, Ca. temp. Talb. 80. 3 P. Wms. 211. 228. *Vernon v. Vernon*, 2 P. Wms. 594. Kel. in Ch. 9. *Deacon v. Wilcocks*, 2 Vern. 558.

54. Tenant for life, remainder to his sons in tail, remainder to his nephew in tail, remainder over, having no son but only a daughter, let the nephew into immediate possession of his estate, on his covenant to permit the uncle's appointee to receive the rents, so long as the nephew should enjoy the estate in his lifetime. The uncle lived 12 years afterwards, and being in debt he made an appointment to a trustee in favor of his daughter, and then died. Upon a bill by the uncle's creditors for an account and satisfaction out of his assets, it was insisted for them, that the kind of interest granted was such as the testator would have been entitled to the benefit of, although he had made no particular appointment. But Lord Chancellor was of opinion, that without making a particular appointment neither he nor any in his place could have any benefit of the covenant, for it must be considered as a covenant or grant of the interest in the land; perhaps it may partake of both, but considering it as a covenant, no action of covenant could be maintained by testator's executors upon the deed until appointment made by testator. Taking it as a grant of the interest in the land, it was such as could not take effect until appointment. If an appointee had been named in the deed, as if it was to deliver possession, and let any other particular person receive the rents and profits, Lord Chancellor would have thought it had operated not barely as a covenant but as a grant or kind of demise

Whose Advantage.
13 July 1750, cor. Hardw. C.
Lord Townsend v. Windham,
2 Vesf. 4.

(a) This has been determined in several instances, that though it is by way of covenant it operates the other way, as in Lord Mountjoy's case, in 4 Leo. 147. so in 3 Leo. 305. in Pollexfen's time, that it was a grant of a way not operating as a covenant.

demise of the term, or chattel interest to take effect in possession out of his remainder in tail, when that remainder took effect in possession (a). In this case no person was named at the time, but when the testator executed the power by nominating an appointee, then it became complete, and operated as a grant of the land for that chattel interest to take effect out of his remainder in tail from that time. The testator had a power to appoint the benefit of the covenant generally to any person, or to take it to himself: he has appointed voluntarily to his daughter, and in respect of his creditors it must be considered as part of his estate at the time of his death. Decreed the appointment void as against the creditors, and that whatever arises out of the deed, is a part of the general assets of the testator, his daughter having no specific lien upon the fund unless any surplus after debts.

How created.

24 July 1750, cor. Hardw. C.
Williamson v. Codrington,
1 Ves. 516.

55. The words, "*I do oblige myself, my heirs, executors, and administrators, to warrant and for ever defend, &c.*" amount to the same as "*I covenant, &c.*" Many other words in a deed will amount to a covenant besides the word *covenant*, as "*I oblige, agree.*"

Executed or satisfied.

10 May 1751, cor. Hardw. C.
Pinnel v. Hallet, Ambl. 106.
1 Eq. Abr. 26.

Vide Tyrconnel v. Ancaffer,
Ambl. 237. *Londonderry v. Wayne*, Ambl. 424.

56. J. S. covenanted on marriage to settle on his wife and issue lands of the value of 500 l. *per annum*; afterwards he purchased lands at M. worth 180 l. *per annum*, and by will directed them to be applied in part satisfaction of the covenant. The value of these lands fell to 150 l. *per annum*. *Per cur.*—Let the Master inquire the value at testator's death, and let that be a satisfaction *pro tanto*. If they had been purchased at the time of the marriage, the value should have been taken as at the time of the purchase.

Executed or satisfied.

1 July 1752, cor. Hardw. C.
Prime v. Stebbing, 2 Ves. 409.

57. Lands *devised* to a wife are not a satisfaction or performance of a covenant in marriage articles that lands *settled* on her are of a certain value: especially where it appears clearly to be the intention that she shall have the *devised* lands over and above those *settled*.

Where binding.

7 Nov. 1752, cor. Hardw. C.
Lewis v. Nangle, Ambl. 150. and
2 P. Wms. 664. in a very explanatory note by Mr. Cox to the case of *Evelyn v. Evelyn*.

58. Where money borrowed on the wife's estate partly to pay her debts contracted *dum solâ*, and partly for the husband's use, he shall not indemnify her estate from any part of it. But where the husband borrows a sum for his own use, and the wife

§ 1. Several Sorts of—how created, &c.

C—o 401

wife joins in a mortgage of her jointure for payment of it, her estate shall be a creditor on the husband for that sum.

Vide Lord Huntingdon's case, 2 Vern. 347. 1 Bro. P. C. 1. Robinson v. Gee, 1 Vef. 252. Pocock v. Lee, 2 Vern. 604. Bagot v. Oughton, 1 P. Wms. v. Hooper, 3 Bro. Ch. Ca. 201.

347. Lord Kinnoul v. Money, cited 3 Bro. Ch. Ca. 206. Clinton Patriche v. Powlet, 2 Atk. 384. Lacam v. Mertins, 1 Vef. 313.

59. The words *grant* and *demise* are implied covenants, with this distinction, that if there are covenants in the same deed from the same person by which he covenants in a more restrained manner, that will restrain the general effects of those words (a).

How created.

10 Dec. 1754, cor. Hardw. C. Saltern v. Melbuisb, Amb. 250.

(a) A general implied warranty

is controlled by an actual covenant in a restrained manner. Vaugh. 116.

A covenant may operate as a release, as a covenant not to sue a bond may in case of an action on the bond be pleaded in bar.

60. J. E. covenants to lay out 7500*l.* in the purchase of lands, to the use of himself for life, with remainder to his first and other sons in tail male. He purchases lands in fee of that value, and permits them to descend to his eldest son. Held, that the lands so descended are a satisfaction of the covenant.

Executed or satisfied.

22 April 1762, Dom. Proc. Davys Esq. v. Howard & Ux. 5 Bro. P. C. 552. 567.

So if a man covenants to leave his wife a certain sum, and dies intestate, and the widow's distributive share of the assets amounts to the sum covenanted; she cannot have both, but the one shall be deemed a satisfaction of the other.

Inherent.

12 Feb. 1763, cor. Henley, C. Lady Londonderry v. Wayne & Ux. Amb. 424.

61. A. devised certain lands to his son B. for life, remainder to his first and other sons in tail male, remainder to testator's second and third sons, &c. with a power for his sons, when in possession, to make a jointure out of any part of the estate not exceeding 400*l. per annum*. B. by articles previous to his marriage, covenanted to settle 400*l.* a year *clear of taxes and reprises*. A settlement was afterwards made of lands, with covenants that if they should fall short of 400*l. per annum* B. would make up the deficiency. Held, that the settlement was intended as an execution of the power, and the covenant to make it a *clear* 400*l.* a year was a mistake.

Executed or satisfied.

8 Mar. 1773, Dom. Proc. Broughton Bart. v. Errington Esq. & al. 7 Bro. P. C. 12.

62. To make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land
Vol. II. D d for

for money or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature of the thing to be satisfied therewith, as to appear indisputably to be equivalent, or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed.

Where binding.
P. 1782, cor. Thurlow, C.
Williams v. Williams,
1 Bro. Ch. Ca. 152.

Vide Noys v. Mordaunt, 2 Vern.
581.

Non-performance.
P. 1784, cor. Thurlow, C.
Wade v. Pegot,
1 Bro. Ch. Ca. 363.

Executed.
3 Feb. 1785, cor. M. R.
Sowden v. Sowden,
1 Bro. Ch. Ca. 582.
The cases cited in this cause
were *Took v. Hastings*, 2 Vern.
97. *Roundell v. Brems*, 2 Vern.
482. *Wilcox v. Wilcox*, 2 Vern.
558. *Bridges v. Bere*, 2 Eq.
Abr. 34. *Wilks v. Wilks*,
5 Vin. Abr. 293. *Lechmere v.*
Lechmere, Ca. temp. Talb. 80.
3 P. Wms. 211. *Coffin v. Dyke*,
or *Dyke v. Leeds*, 7 July 1740.
Deacon v. Smith, 3 Atk. 323.
Attorney-General v. Whorewood,
1 Vef. 534. *Davys v. Howard*,
5 Bro. P. C. 552. *Edwards v.*
Freeman, 2 P. Wms. 435. 665.
Lewis v. Bill, 1 Vef. 274.

63. Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise, should be bound by the settlement. This covenant was restrained to what should come from the mother only, and not to property coming unexpectedly from other quarters. To bind an infant, the marriage settlement must be fair and reasonable, and not to deprive her of every thing.

64. Where legal and equitable estates meet in the same person, the equitable merge in the legal. A certain estate is covenanted to be conveyed, and is not so, the breach of the covenant is in damages, and such damages are money, not land, in the hands of the party injured.

65. *R. S.*, by marriage settlement, in consideration of 1050*l.* portion, covenanted to pay the trustees 1500*l.*, to be laid out in the purchase of lands upon certain trusts. He also covenanted to pay the trustees 500*l.* more for similar uses, and that in case the lands purchased should not sell for 2000*l.* the deficiency to be made up out of his personal estate. *R. S.* never paid the money to the trustees; but soon after his marriage purchased a freehold estate for 2150*l.*, and the estate was conveyed to him in fee. Afterwards he died without making any settlement of the purchased estate, leaving a widow, a son, and a daughter. The real estate descended on the son, and the widow took out administration. On a bill by the daughter to have the trusts of the settlement performed, his Honor (on the authority of *Lechmere v. Lechmere*, Ca. Temp. Talb. 80.) decreed that the purchased estate should be considered as bought by *R. S.* with a view to perform the covenants in the settlement, and was therefore bound in equity to the performance of them: and his Honor conceived the established principle to be, that "where a man is bound to do an act, and he does

" what

§ 1. Several Sorts of—how created, &c.

C—o 403

" what may enable him to do the act, it shall be
" taken to have been done by him with the view
" of doing that which he was bound to do."

66. Proviso in a settlement, that the wife shall not be barred of any thing the husband shall give by deed, or leave by will; he dies intestate, and a freeman of London; her share by the statute and custom, are not a satisfaction of the covenant.

Executed or satisfied.
T. 1786, cor. Thurlow, C.
Kirkman & al. v. Kirkman & al.
2 Bro. Ch. Ca. 95.
Blandy v. Widmore, 1 P. Wms.
324. Lee v. D'Aranda, 3 Atk.
419.

67. A. purchased an estate in mortgage, and covenanted with the mortgagor to discharge the mortgage. A. is bound by this covenant, and his personal estate shall not exonerate the real estate charged with this debt.

Where binding.
18 July 1786, cor. Thurlow, C.
Tewdell v. Tewdell,
2 Bro. Ch. Rep. 101. 152.
Vide Cope v. Cope, 2 Salk.
449. Evelyn v. Evelyn, 2 P.
Wms. 659. Cornish v. Mew,
Wms. 347. Lacam v.

Ch. Ca. 271. Pockley v. Pockley, 1 Vern. 36. Ragot v. Oughton, 1 P. Wms. 347. Lord Rochford v. Belvidere, 6 Bro. P. C. 520.

68. A male infant married an adult female, who, by settlement, covenanted that her estate should be settled to certain uses: he is bound by her covenant.

Where binding.
H. 1789, cor. Thurlow, C.
Stoccombe & al. v. Glubb & al.
2 Bro. Ch. Ca. 545.
Note; Ld. Chancellor seemed
to dwell upon the circumstance
that there was no appearance of fraud in this case on the intended husband.

69. Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt; his assignees are bound by the covenant, though no recovery was suffered.

Inherent.
H. 1791 and P. 1792, Canc.
Pye v. Daubuz and another,
3 Bro. Ch. Ca. 595.
Vide Beck v. Wells, 1 Willf.
276. Edwards v. Appleby, 3 Bro. Ch. Ca. 652. (n.)

70. A covenant to appropriate one-third of the produce of a real estate, to raise a sum of money; it is not a mere personal covenant suable at law, but creates a lien upon the land; and the covenantees are entitled to have it specifically performed.

Real.
P. 1792, cor. Thurlow, C.
T. 1793, reheard, cor. Loughb. C.
Legard v. Hodges,
3 Bro. Ch. Ca. 531.
4 Bro. Ch. Ca. 421.
Vide Collins v. Plummer, 1 P.
Wms. 104. where a covenant

not to suffer a recovery was held a mere personal covenant.—Broughton v. Langley, 2 Salk. 679. where it was held, that though the estate was to remain in the covenantor, there was a trust for the benefit of the covenantees.

71. Bill for a discovery only, in aid of an action of covenant. Plea, a clause in the articles, that any dispute should be referred to arbitration. Plea over-ruled, a discovery being of course, while an action can be maintained. A mere covenant to refer is no bar to an action, as an express agreement would be (a) that there should be no suit at law or in equity: parties may so agree, and it is every day's practice.

Executory.
1 May 1793, cor. Loughb. C.
Mitchell v. Harris,
2 Vef. jun. 132.

(a) As in Halfhide v. Fenning,
2 Bro. Ch. Ca. 336.

Real.

21 Nov. 1793, cor. M. R.
Jackson Widow & al. v. Jackson
 & al. 4 Bro. Ch. Ca. 462.

Vide Coventry v. Coventry,
 1 Stra. 596. and *Alford v. Alford*,
 and *Hollinghead v. Hollinghead*,
 there cited. *Andrew v. Emmott*,
 2 Bro. Ch. Ca. 297.

Inherent.

14 May 1796, cor. M. R.
Woods v. Huntingford,
 3 Ves. jun. 131.

(a) *Vide Evelyn v. Evelyn*, 2 P.
 Wms. 664. and Mr. Cox's judi-
 cious note thereto, in which he
 subject.

(b) *Vide Tweddell v. Twed-*
dell, 2 Bro. Ch. Ca. 101. 152.
 which is a governing case on this
 question.

Non-performance.

H. 1797, in Seacc.
Jones & Ux. v. Martin,
 3 Anst. 382.

In *Edmunson v. Cox*, 7 Vin.
 Abr. 207. pl. 11. the deed was
 never delivered, and therefore not
 binding on the grantor as a gift.
 In *Hall v. Hall*, 2 Vern. 277. an absolute gift is held good; but if a freeman of London retains a power over the property, it is a fraud on the custom, and void. In *Turner and Jennings*, 2 Vern. 612. a deed purporting to convey an absolute future interest was held void only as being so recently before the death as to be merely a *donatio causa mortis*, and in its nature a testamentary bequest, although in the form of a deed; and in *Tomkins v. Ladbroke*, 2 Ves. 594. Lord Hardwicke recognized the same doctrine.

Note; Before the defendant transferred any property into his son's name, he submitted a case for the opinion of the present Lord Kenyon, who advised him "that he was not restrained by the covenant" from giving away any part of his personal estate, provided the gift were absolute, and to take effect
 "in

72. A father was tenant for life, and his son tenant in tail in remainder of an estate; under a settlement made on the marriage of the father, wherein was a power for the son, when in possession, to make a jointure. The father and son enter into a general covenant (without reciting or referring to the power) that the son, within 12 months, shall make a jointure on a then intended wife. The father dies within 12 months; the son takes possession and dies without making any settlement. The estate is bound by this covenant in the hands of the remainder-man; and the persons entitled under it have a right to call for an execution thereof.

73. An estate sold subject to a mortgage was, in this case, exonerated in favour of the heir by the personal estate of the purchaser; he having clearly made it his own debt by his personal acts.

Where a mortgaged estate descends, and the mortgagee is pressing for his money, and in consequence the security is assigned; a mere covenant by the heir upon that occasion, for payment, does not make it his personal debt (a).

has collected all the material authorities, rules, and principles on this

So a mere covenant by the purchaser of a mortgaged estate to indemnify the vendor, does not make it his personal debt (b); if he has not any contract or connection with the mortgagee, nor shews any intention to transfer the debt from the estate to himself; for the covenant is what he must enter into if he pays a less price in consequence of the mortgage.

74. Where a father, on his daughter's marriage, covenants to leave her at his death, an equal share of his personalty with his son; a gift of his property in the funds to his son, reserving the annual dividends for his own life, is not a breach of the articles.

75. Where a father, on his daughter's marriage, covenants to leave her at his death, an equal share of his personalty with his son; a gift of his property in the funds to his son, reserving the annual dividends for his own life, is not a breach of the articles.

"in his lifetime." And after defendant had transferred all the stock to his son he submitted a second case to the opinion of Sir John Scott, who, "upon the whole, inclined to think that the transfer could not be set aside as a fraud upon the marriage articles."

75. The construction of covenants is the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default.

How construed. 14 Mar. 1798, cor. Sir P. Arden, M. R. *Eaton v. Lyon*, 3 Ves. jun. 690. *Vide Bayley v. Leominster Corporation*, 3 Bro. Ch. Ca. 521. 1 Ves. jun. 476. on the principles of which his Honor decided this case.

A legal instrument is not to be construed by the acts of the parties.

See more, tit. *Agreement, Bond, Condition, Deeds, Mortgage, Power, Warranty.*

Of Tenant in Tail and Remainder-man, see *Estate-tail.*

Of the Covenants in Leases, as well general as special, see *Landlord and Tenant.*

Of Money covenanted to be laid out in Land, how considered, see *Money.*

SEC. 2. What shall amount to a Covenant to stand seised.

1. A CONVEYANCE by way of feoffment may operate as a covenant to stand seised.

P. 1682, Canc. *Thompson v. Atfield*, 1 Vern. 40.

2. A. by indenture without livery, granted, enfeoffed, and confirmed his land to trustees, to stand seised to the use of his three brothers, in consideration of blood: decreed this should work as a covenant to stand seised.

H. 1683, cor. North, C. S. *Thorne v. Thorne*, 1 Vern. 141. *Vide* 1 Vent. 137. 1 Lev. 9. 1 Mod. 175.

3. A feme seised of a copyhold, on marriage of her daughter to J. S. surrenders it to the use of J. S. in fee; the marriage takes effect, the husband signs a writing whereby he owns that the limitations of the remainder in fee to him was a mistake, being intended for the wife, and he accordingly covenants to stand seised of this remainder in trust for the wife in fee: this is not a mere voluntary covenant, and equity will compel the performance of it.

T. 1728, cor. King, C. *Randall v. Randall*, 2 P. Wms. 464. 2 Eq. Abr. 27. pl. 31.

4. In the case of a conveyance by lease and release, the lease being lost does not at all concern the substance of the case; and a consideration

25 Oct. 1744, cor. Hardw. C. *Brown v. Jones & al.* 1 Atk. 191.

(a) That is to say, a consideration of marriage or blood for a pecuniary consideration will not raise an use by way of covenant to stand seised. *Vide Sanders on Uses and Trusts* 558. also *Lloyd v. Spillet*, 2 Atk. 149. If a purchaser for a valuable consideration by some defect in the conveyance has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Vide Pollexfen v. Moor*, 3 Atk. 273.

See more, tit. *Uses*.

SEC. 3. How far the Covenantor shall be bound where he covenants for the Acts of his Ancestor or of any other Person.

M. 1715, cor. Cowper, C.
Barrington v. Horn & al.
5 Vin. Abr. 547. pl. 35.
2 Eq. Abr. 17. pl. 7.

The husband and wife were parties to the deed, but the husband only sealed it, though the covenant was that the husband and wife should levy a fine, and a fine *sur consens de droit*, &c. was levied by the husband alone.

M. 1718, cor. Cowper, C.
Orrind or Ostram v. Round,
4 Vin. Abr. 203. pl. 4.
2 Eq. Abr. 145. pl. 4.

Lord Cowper in this case said, it is a great breach upon the wisdom of the law to compel a husband to procure his wife to levy a fine, and force her to part with her land without her consent. *Vide Barrington v. Horn*, 2 Eq. Abr. 17. pl. 7. where a specific performance was decreed; and *Hall v. Hardy*, 3 P. Wms. 189. S. P. and *Winter v. Devereux*, there cited.

1. BILL to compel the defendant and his wife to join in a fine to the plaintiff, pursuant to his covenant, in a conveyance. The defendant and his wife and H., their son and heir, set forth in their answer, that defendant H. is tenant for life, remainder to his wife for life, remainder to the heirs of the husband by his wife, remainder to the husband's heirs; and insist that nothing passed by the conveyance but an estate for life of the husband, and that the wife did not seal the deed. Decreed, that the husband should procure his wife to join with him in a fine to the plaintiff, according to his covenant, since he hath taken upon himself to do it, and the plaintiff hath paid the full value of the estate,

2. Husband and wife, for a valuable consideration, by lease and release conveyed the wife's lands in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser: she refused to levy a fine. Plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited where a specific performance had been decreed in the like case: but Lord Chancellor would not decree a specific performance in this case, because, upon such a decree, the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the cited case. His Lordship therefore directed the defendant to refund the purchase money with costs.

Yet,

3. Yet, if it can be made appear to have been impossible for the husband to perform the agreement by procuring the concurrence of the wife, as suppose there are differences between them, and the husband offers to return all the money with interest and costs:—Query, if, under all these circumstances, the court would not discharge the husband from the covenant.

T. 1723, cor. M. R.
Winter v. Devereux,
3 P. Wms. 189. (n.)
Vide *Ortred v. Round*, 2 Eq.
Abr. 145. pl. 4. 4 Vin. Abr.
203. pl. 4. *Barrington v. Harn*,
2 Eq. Abr. 17. pl. 7.

4. If one borrows money for another on a mortgage of his estate, the covenant in the mortgage deed, to pay the money, will bind him for whom it is borrowed, for it is properly his debt and his covenant, and the mortgagor is only a nominal person. The mortgagor may file a bill against his debtor to have his estate disincumbered by him, and so may every surety against his principal, for he shall not be put to his *indeb. assump.*

P. 1730, cor. M. R.
Lee v. Roak, *Mof.* 318.

5. Where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, equity will enforce a performance of the agreement on a presumption that the husband has first gained his wife's consent for that purpose.

T. 1733, cor. Jekyll, M. R.
Hall v. Hardy, 3 P. Wms. 189.
2 Eq. Abr. 28. pl. 35.

6. It was said in this case to be a rule amongst conveyancers, that where an estate has been long in a family, that the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who first bought the estate, there he need not covenant any farther back than from that person, because whoever buys the estate has the benefit of the covenants in the conveyance to the vendor's purchaser. Lord *Hardwicke* said he never heard of such a rule; yet where conveyances are to be made by a decree of the court, they should be settled by such rule as men of judgment amongst conveyancers would direct. There are many cases where a person covenants no further than his own acts, as where an estate is decreed to be sold for payment of debts, and no surplus remains, the court will not require the heir to covenant beyond his own acts. So as to a devisee. But where, after such sale, the surplus is considerable, the heir or devisee in many cases has been directed to covenant, that neither he (the heir) or his immediate

17 Jan. 1745, cor. Hardw. C.
Loyd v. Griffith, 3 Atk. 267.

diate ancestor, nor the devisee or his devisor, has done any act to incumber.

SEC. 4. Of general, implied, uncertain, defective, voluntary, or unlawful Covenants.

Defective.

T. 1694, Canc.
Gell v. Vermuden, 2 Freem. 199.
2 Eq. Abr. 54. pl. 1.

Uncertain.

T. 1709, cor. Cowper, C.
Allen v. Harding,
2 Eq. Abr. 17. pl. 6.
Note; In *Mosely v. Virgin*,
3 Vef. jun. 186. Lord Loughborough said that the statement of this case in 2 Eq. Abr. is a loose note of the case (as most of the cases in that book are.) His lordship said it was very inaccurate, but he did not know where to find a better account of it.

Unlawful.

20 May 1710, cor. Cowper, C.
D. Hamilton v. Ld. Mobun,
1 Salk. 158. 1 Eq. Abr. 90. pl. 6.
1 P. Wms. 121.
Vide S. C. ante, tit. Agreement, f. 7. pl. 9. and notes.

Note; The cases in which courts of equity will relieve against unequal contracts on principles of public policy are stated by Mr. Cox in a note to *Osmond and Fitzroy*, 3 P. Wms. 131.

The following decisions have taken place on points similar to that in the principal case, *Pearce v. Waring*, cited in *Hilton and Hilton*, 2 Vef. 547. *Vide* *Hilton and Hilton*. *Vide* *Griffin and Deveuille*, cited in Mr. Coxe's note to *Osmond and Fitzroy*.—The following cases have been decided on the same ground as *Griffin and Deveuille*, between parent and child, *Gliffon v. Okeden*, 2 Atk. 258. 3 Bro. P. C. 560. *Young v. Pear*, 2 Atk. 266. *Cocking v. Pratt*, 1 Vef. 400. *Hawes v. Wyatt*, 3 Bro. Ch. Ca. 156.

Voluntary.

T. 1715, Canc.
Basse v. Grey Bart. 2 Vern. 693.

General.

T. 1722, cor. Parker, C.
Lewis v. Ld. Lechmere,
10 Mod. 505.
2 Eq. Abr. 689. pl. 9.
Vide S. C. ante, f. 1. with notes.

Voluntary.

P. 1731, Seace.
Parry v. Hughes,
2 Eq. Abr. 54. pl. 12.

1. *A.* covenanted, by articles, to convey lands, but did not covenant for his heirs, yet the heirs shall be bound.

2. *A.* curate of *N.* covenanted to build a house on the glebe land. *B.* brings a bill for a specific performance of the agreement; and it was insisted for the defendant, that the covenant was too loose and uncertain to be performed in specie, both in respect to time and value, and sounds only in damages. Decreed, a convenient house to be built; and for that purpose each party to choose two commissioners, and if they could not agree, then to resort to the ordinary of the diocese.

3. A covenant, before marriage, to release the wife's guardian, within two days after marriage, of all accounts of mesne profits, was set aside in equity as being extorted from the husband, and in nature of a marriage brokerage contract.

4. A voluntary covenant is not to be carried in equity beyond the letter.

5. A covenant to make such a title as vendee's counsel shall approve, means no more than that the plaintiff should make out a good title, for if the counsel disapprove of a good and clear title, the vendee will be bound by his bargain.

6. *E. P.* covenanted to convey all his lands (part being in mortgage) to himself and his wife for their lives, and to the heirs of the marriage; remainder to *E. P.*, plaintiff's father in tail male, who

who was a stranger both in blood and consideration; and having no issue* (and his wife being dead) devised the mortgaged premises to defendant and died. Plaintiff brought his bill to have the covenant executed in favour of him, but it was dismissed. Otherwise, if such covenant had been in favour of children, creditors, or on such other good considerations; for though the making of the agreement was *voluntary*, yet the motive inducing was valuable and good. So in favour of a purchaser, the seller after purchase being considered only as a trustee for the purchaser.

* *Quære* if it was not the covenantor who had no issue, and whose wife was dead, as stated in the text?

7. A question in this case arose, Whether a man was entitled to satisfaction out of assets by reason of an implied covenant? *Per Lord Hardwicke*, The words *grant* and *demise* are implied covenants with this distinction, that if there are covenants in the same deed from the same person by which he covenants in a more restrained manner, that will restrain the general effect of those words (a). *Lord Hardwicke* also said there was no case within his knowledge where relief could be had in equity for satisfaction merely on an implied covenant.

Implied.
10 Dec. 1754, cor. *Hardw. C.*
Saltern v. Melbuis, *Ambl.* 250.

(a) A general implied warranty is controlled by an actual covenant in a restrained manner. *Vaugh.* 126.

8. *A.*, by settlement, after marriage (not being indebted) (a), conveyed to trustees to family uses, reserving a power to sell, but covenanting that the purchase money should be paid to the trustees to be laid out to the same uses; *A.* then sold to *B.*, who had notice of the covenant, and paid the money to *A.* *A.* died insolvent. Decreed, that *B.*'s representative should not be obliged to pay the purchase money over again to the trustees to the uses of the settlement, which being voluntary, was fraudulent against a purchaser by the 27 *Eliz.*

Voluntary.
H. 1787, cor. *Thurlow, C.*
Evelyn v. Templar,
2 *Bro Ch. Ca.* 143.
1 *Eq. Abr.* 24.

(a) The circumstance of *A.*'s not being indebted (though stated) is immaterial as to settlements void against purchasers under 27 *Eliz.* *Lord Hardwicke* drew this distinction between 13 *Eliz.* which respects creditors, and 27 *Eliz.* respecting purchasers, in *Lord Townsend v. Windham*, 2 *Ves. fo.*

9. A general covenant (loose and undefined) to lay out a certain sum in a building of a certain value, cannot be executed if it does not expressly distinguish what the building is to be, so that the court can describe it as a subject for the report of a Master.

General and uncertain.
7 July 1796, cor. *Loughb. C.*
Mosely v. Virgin, 3 *Ves. jun.* 184.

Of Voluntary Covenants, see *Agreement, Bond, Debts, Deeds, Marriage, Seduction.*

Of unlawful or unreasonable Covenants, see *Agreement, Bond, Consideration, Deeds, Fraud, Heir, Seduction.*

GENERAL REFERENCES.

- Coal-Mine*—see *Mines*.
Codicil—*Will*.
Collateral Evidence—*Evidence*.
College—*Charity, Corporation*.
Collieries—*Mines*.
Collusion—*Fraud*.
Committee—*Lunatic*.
Commitment—*Bankrupt, Contempt*.
Common Recovery—*Recovery*.
 ———, *Tenancy in*—*Joint-tenant, Partners*.
 ——— *Seal*—*Corporation*.
 ———, *Right of*—*Coppyhold*.
Company—*Corporation*.
Compos Mentis—*Lunatic, Will*.
Composition real—*Tithe*.
 ——— of *Debts*—*Debts*.
Compulsion—*Deeds*.
Concealment—*Deeds, Fraud*.
Conclusion—*Estoppel*.
Condemnation of Goods after Seizure—*Revenue*.
Conjunctive and Disjunctive — *Words, Exposition of*.
Conquered Countries—*Colonies*.
Consanguinity—*Descent, Distribution, Heir*.
Construction—*Deeds, Words*.
Contraband Goods—*Revenue*.
Contracts—*Agreement, Trade, Usury*.

GENERAL REFERENCES.

Contingent Remainder—Devise, Estate, Remainder.

—— *Debts*—Bankrupt.

—— *Interest*—Devise, Estate on Contingency, Remainder.

Contribution—Average, Debts, Legacy, Proportion.

Conversion—Devastavit, under tit. Executors and Administrators, Trover.

Conveyance—Deeds, Release.

Co-obligors—Bond, Surety.

Coparceners—Gavelkind, Joint-tenant, Parceners, Partition.

Copyright—Literary Property.

Counsellor—Equity, Officers of.

County Palatine—Palatine County.

Court of Chancery—Equity.

—— *of Exchequer*—Equity.

Court Inferior—Inferior Court.

—— *Spiritual, or Christian*—Ecclesiastical Persons and Things.

—— *foreign*—Foreign Courts.

—— *of Stannaries*—Stannaries.

—— *of Orphans*—London, Customs of.

—— *of Chivalry*—Chivalry.

Courts—Jurisdiction.

Coverture—Baron and Feme.

Covin—Deeds, Fraud.

Cross-Bills—Bill.

—— *Examination*—Evidence.

Crown—Prerogative, Revenue.

C—u

Curtesy.

Of the Requisites to give an Estate by the Curtesy—Of the Condition and Power of the Tenant; to what Charges, Incumbrances, or Forfeitures he shall be subject, and how far favoured in Equity.

M. 1695, Canc.

Snell v. Clay, 2 Vern. 324.

(a) This benefit was denied to a dowress in *Bodmin v. Vendebendy*, Prec. in Ch. 65. and in *Brown v. Gibbs*, Prec. in Ch. 97.

which occasioned the distinction to be advanced between a tenant by the curtesy and in dower; but it has since been exploded or declared unreasonable, and Lord Somers himself (when *Snell and Clay* was cited and urged in *Brown v. Gibbs*) admitted there was no difference, and he avoided the authority of *Snell and Clay* by saying, that the point of a tenant by the curtesy's having the benefit of a trust-term was not debated in the court.—*Dict. per M. R.* in *Banks v. Sutton*, 2 P. Wms. 706.—*Vide post*, tit. *Dower*.

H. 1705, cor. Cowper, C. S.

Sweetapple v. Bindon,

2 Vern. 536.

Vide Otway v. Hudson, 2 Vern.

536. *Cunningham v. Moody*, 1 Ves. 176.

S. C. cited in Otway v. Hudson.

Vide Worthington v. Fletcher, as well as of a legal estate.

cited in *Williams v. Wray*, 2 Vern. 681. S. P. decreed.

H. 1708, cor. Cowper, C.

Watts and others v. Ball & al.

1 P. Wms. 108.

2 Eq. Abr. 727. pl. 2.

Cited 2 Vern. 680.

1. **TENANT** by the curtesy shall have the aid of equity against a trust term (a) assigned in trust to attend the inheritance, and set up against him by the heir at law.

2. *A.* devised 300 *l.* to be laid out in land and settled to the use of his daughter and her children, and if she died without issue to go over. She married *B.* and had a child by him; both she and the child died before the money was laid out: on a bill by *B.* either to have the money laid out or the interest of it for his life, in lieu of the rents and profits, decreed the money to be considered as land, and *B.* to be tenant by the curtesy.

A man may be tenant by the curtesy of a trust as well as of a legal estate.

3. One seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts and convey the surplus to his daughters equally. The younger daughter married, and died leaving her husband and an infant son. On the eldest daughter bringing a bill for a partition, decreed that the husband of her sister should be tenant by the curtesy (a).

(a) There shall be a tenancy by the curtesy of a trust as well

as of a legal estate, *vide Sweetapple v. Bindon*, 2 Vern. 536. *Chaplin v. Chaplin*, 3 P. W. 234. *Casbourne v. Scarfe*, 1 Atk. 603. *Burgess v. Wheate*, 1 Blackst. Rep. 138. 161. 182. *et vide Harg. Co. Litt.* 29. a. note 6. Trust estates are to be governed by the same rules and within the same reason as legal

legal estates. *Philips v. Philips*, 1 P. Wms. 35, and if there was not the same rule of property in all courts, things would be at sea, and there would be the utmost uncertainty, which general position extending to the case of dower as well as curtesy, may be reckoned an authority for the one as well as the other. That trusts and legal estates are to be governed by the same rules is a maxim which has obtained universally, and it is so in the rules of descent, as in *Gavelkind* * and *Borough English* lands, there is a *possessio fratris* of a trust as well as of a legal estate; the like rules exist in limitations, and as also of barring entails of trusts as of legal estates. There is no exception out of this general rule, nor any reason that there should be. It would be impossible to fix the boundaries and shew how far it ought to go. Perhaps in early times the necessity of keeping to it was not seen or thoroughly considered. *Banks v. Sutton*, 2 P. Wms. 713.

* In *Gavelkind* lands a husband may be tenant by the curtesy without having issue. 1 Inst. 30. But it is only of a moiety of the wife's lands, and ceases if the husband marries again. *Robins. Gavelk.* h. 2. c. 1.

† 1 Inst. 18. b. 1 Co. 121. b.

4. *J. S.* devised his lands to *A.* his sister (who was his heir at law) for her life, and that if she married and had issue male of her body living at the time of her death, then to such issue male and to his heirs male for ever; but if she died, leaving no issue male at the time of her death, then to *B.* and his heirs for ever. *J. S.* died, and *A.* married defendant *C.*, by whom she had issue a son and a daughter; then *A.* died, and afterwards the daughter died, and the son survived, who afterwards died. Upon the death of the wife the contingent estate tail to her issue began, so that at that time the estate was to commence in possession and be consummate, because her estate for life, by which it was to be supported, was gone; so that the inheritance being never vested in her during her life, for that reason her husband cannot be tenant by the curtesy.

contingent estate, which is to arise on her death intervenes between her estate for life and the inheritance. *Vide Year-book*, 1 Ed. 3. 14, 15.—45 Ed. 3. 16.

5. *J. S.* a papist, seised in right of his wife, and having issue by her, he thereby became entitled to be tenant by the curtesy. *J. S.* joined in a fine with his wife. Decreed that *J. S.* being a papist could take no larger estate under the fine than he had before, but that he might take as large, as had been determined.

It should seem that a papist may be tenant by the curtesy (notwithstanding 11 & 12 W. 3. to prevent the growth of popery) that estate being cast on him by the act of law and not by purchase.

Note; By stat. 3 Jac. 1. c. 5. a popish recusant convict, who is married otherwise than in open church, and by a lawful minister, shall not be tenant by the curtesy.

6. Tenancy by the curtesy is not so much favored in law as dower. The nature and circumstances of

T. 1725, cor. Lds. Comrs.

Boothby v. Vernon, 9 Mod. 147.

2 Eq. Abr. 727. pl. 3.

If testator had intended that his sister should have any benefit of the inheritance (as he had the whole dominion over his estate,) he would evidently have shewn it; and if the operation of law should be otherwise, that would be an injury done to the testator's intent—Wherever the estate is to be determined by express limitation or condition on the death of the wife, there the husband shall not be tenant by curtesy; as where an estate for life is limited to a woman, remainder to her first and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs; here it is plain she is seised of the inheritance; yet if she has a son, the husband shall not be tenant by the curtesy, because the estate for life and the inheritance.

T. 1725, cor. Price, B. abf. C.

Witbrington v. Banks,

Sel. Ca. in Ch. 30.

2 Eq. Abr. 624. pl. 15.

Vide 3 P. Wms. 49. Mr. Cox's note.

H. 1732, cor. M. R.

Banks v. Sutton, or *Sutton v. Sutton*, 2 P. Wms. 700. to 710.

2 Eq. Abr. 387. pl. 11.

(a) *Vide* S. C. post, tit. *Dower*,
more at large.

of each in this case are compared and considered; but herein particularly of curtesy (a):

A husband has *no* right to a tenancy by the *curtesy*, but from positive institutions or provision of the laws, whereas dower is a *moral* as well as a *legal* and an *equitable* right. The husband's right to curtesy does not arise from the relation of husband and wife, for then every husband would have it, which is not so, nor doth the husband want it. If it be not his own fault (or his misfortune) he is, during the coverture, master not only of his own, but of his wife's estate, and by his industry and provident care may acquire property sufficient without any part of her estate to maintain himself after her death, so that the husband's tenancy by the curtesy has no *moral foundation*, and is therefore properly stiled a tenancy by the *curtesy*, that is an estate by *favor* of the law of *England*.

Dower is founded in the marriage contract and is an equitable right to which curtesy has no pretence. It is wonderful, therefore, how a tenant by the curtesy was ever deemed entitled to relief in equity more than a dowress, and particularly that a tenancy by the curtesy might be of a trust estate, but not dower: that is a direct opposition to the rule and reason of the law allowing dower of a seisin in law, but not a tenancy by the curtesy, because the wife cannot gain an actual seisin, but the husband may, which reason holds in a trust estate; for the wife cannot gain or compel a trustee to convey the legal estate to the husband, but the husband himself may, therefore, if any distinction is to be made, dower ought to be preferred to curtesy.

(b) 2 Vern. 324.

(c) Prec. in Ch. 65.

(d) Prec. in Ch. 97.

Lord Somers in *Snell v. Clay* (b), decreed that a tenant by the curtesy should have the benefit of a trust term attendant on the inheritance, which he denied to a dowress in *Bodmin v. Vendebendy* (c) and *Brown v. Gibbs* (d); but that doctrine has been since declared unreasonable; and Lord Somers, in *Brown v. Gibbs*, avoided the authority of *Snell v. Clay*, by saying the point of a tenant by the curtesy, having the benefit of a trust term, was not debated in that cause.

(e) *Vide* *Dudley v. Dudley*,
Prec. in Ch. 241. *Higford v.*
Higford, 1 Eq. Abr. 219. pl. 5.
Wray v. Williams, 1 P. Wms.

The opinion of Lord Ha'e, in *Hard*. 489. and all the resolutions (e) in the case of tenant by the curtesy, seem to have settled the point both as to dowresses and tenants by the curtesy, that each shall

shall have the benefit of a trust term attendant on the inheritance against an heir.

137. *Brown v. Gibbs*, Prec. in Ch. 65. *Bodmin v. Vendebody*, Prec. in Ch. 97.

Perkins (who wrote before the statute of uses) fo. 69. f. 349. says there shall be no dower of a use, and in fo. 199. f. 457. he says there shall be no curtesy of a use which shews he considered them both as standing on the same footing. The preamble to the statute of uses (f) recites, "that by uses men lost their tenancies by the curtesy and women their dowers." These words ought not to be taken in a general sense, for the uses complained of were such as were created by fraudulent assurances and were secret; but supposing all uses before the statute were thought to bar tenants by the curtesy and dower, in equity as well as at law it will not follow that trusts or equitable interests are to be considered now as they were then.

(f) 27 H. 8. c. 10.

The great question in this case was, Whether a widow should be endowed of an equity of redemption, though the mortgage was made in fee before the marriage upon her paying a third of the mortgage money or keeping down a third of the interest; and it was decreed *per M. R.* that the widow should be endowed, and if the parties differed that her dower should be set out (g).

(g) It is now settled, however, that a wife shall not be endowed

of a trust estate of inheritance or of an equity of redemption of a mortgage in fee, *vide Chaplin v. Chaplin*, 3 P. Wms. 229. *Attorney-General v. Scott*, Ca. temp. Talb. 138. *Godwin v. Winmore*, 2 Atk. 525. *Burgefs v. Wheate*, 1 Blackst. Rep. 138. 161. *Dixon v. Saville*, 1 Bro. Ch. Ca. 326.

7. Lord Chancellor in this case said it would be dangerous to titles to let in the claim of dower upon trust estates. He took it to be settled that a husband should be tenant by the curtesy (a) of a trust, though a wife should not have dower thereof; for which diversity, as he could see no reason, so neither would he have made it; but since it had prevailed he would not alter it. No case appeared to his Lordship where dower of a trust (abstracted from all other circumstances) was allowed (b). Wherefore his Lordship dismissed the bill in this case as to the claim of dower in a trust estate (c).

H. 1733, cor. Talbot, C. *Chaplin v. Chaplin*, 3 P. Wms. 234. 2 Eq. Abr. 284. pl. 10, 11. (a) *Vide Calbourn v. English*, 1 Atk. 603.

(b) *Vide Banks v. Sutton*, 2 P. Wms. 700.

(c) In *Shepherd v. Shepherd*, 1736, cor. Lord Talbot, the Attorney General and Mr. Fazakerlay (of counsel for the widow) considered this point to have been so

clearly settled by the above resolution that they declined speaking to it.

8. An husband does not forfeit his tenancy by the curtesy on leaving his wife and living in adultery, as a wife forfeits her dower by elopement, because the statute of *Westm. 2. c. 34.* does by express words in such case create a forfeiture of dower;

P. 1734, cor. Talbot, C. *Sidney v. Sidney*, 3 P. Wms. 276.

M. 1735, cor. King, C.
*Dale of Somerset v. France (or
 France) & al. Fortesc. 41.*

H. 1738, cor. Hardw. C.
Cashborn v. English & al.
 7 Vin. Abr. 156. pl. 23.
 1 Atk. 603.
Cashborn v. Scarfe,
 2 Eq. Abr. 728. pl. 6.

His lordship observed, that this case depended on two considerations; first, What kind of interest an equity of redemption is considered to be in the eye of this court? secondly, What is requisite to entitle the husband to be tenant by the curtesy?—As to the first, his lordship said, an equity of redemption has always been considered in this court as an estate in the land; it is such an interest in the land as will descend from ancestor to heir, and may be granted, intailed, devised, or mortgaged, and that equitable interest may be barred by a common recovery, which proves that an equity of redemption is not considered barely as a mere right, but such an estate, whereof, in consideration of this court, there may be a seisin, or a devise of it could not be good. The person who is entitled to the equity of redemption is in this court considered as owner of the land, and the mortgagee to retain the land as a pledge or deposit. And for this reason it is that a mortgage in fee is considered as a personal estate, notwithstanding the legal estate vests in the heir in point of law. The husband of a mortgagee in fee shall never be tenant by the curtesy of the mortgaged estate, unless there be a foreclosure, or that such mortgage has subsisted for so great a length of time as the court thinks sufficient to induce them not to grant a redemption.

A mortgage in fee will not pass under a devise of all my lands, tenements, and hereditaments. Vide *Litten and Faulkland*, 2 Vern. 625, where it is said, if it was a release of an equity of redemption of foreclosure, it is now part of the real estate in the land. *Burnet and Kingston*, 2 Vern. 401. a mortgage in fee in right of the wife on the husband's dying and not disposing thereof, was decreed to be a chose in action, and survive to the wife; from whence it follows, that the person that is entitled to the equity of redemption is owner of the land; for if a mortgage in fee in right of the wife is on the death of the husband decreed to be but a chose in action, if the ownership of the land is not in the mortgagor, it is

dower; but there is no act inflicting the forfeiture of a tenancy by the curtesy in the husband.

9. It was said in this case to have been agreed, that a custom for every copyholder, upon the change of every lord, to pay a fine, is a void custom; but that where the lord is only tenant for life, or by the curtesy, such custom is good.

10. T. C. plaintiff's father, and also father of the wife of the defendant J. S. by virtue of a marriage settlement, being seised of some lands in tail, and of other lands in fee simple, had issue three daughters. Part of the land of which he was seised in fee he settled on himself for life, remainder to Ann his eldest daughter in fee, and the other Part of such lands he devised to the said Ann and her heirs, subject to the payment unto her two sisters of 200 l. a piece. Ann, after her father's death, by lease and release of 24 and 25 June 1728, mortgaged part of the fee simple lands to defendant Scarfe in fee. Proviso to be void on payment of 900 l. and interest. On 6 August 1729 Ann intermarried with defendant J. S., and in 1731 she died, leaving issue by him a son, who died without issue, and on his death his two aunts the plaintiffs became his heirs at law, and entitled to that inheritance, and in T. 1733 brought their bill against the mortgagee Scarfe, (who came into possession in 1731) and J. S. (int. al.) for a redemption of the mortgaged premises, and to have an account of the rents and profits of the real estate which belonged to the defendant J. S.'s wife, that descended to his son, from the time of the death of such son as heir at law to both of them. Defendant J. S. insisted to be entitled to the mortgaged premises for his life, as tenant by the curtesy of the mortgaged estate; but his Honor (8 May 1735) held that he was not, and so was decreed to account for the rents, &c. thereof from his son's death. On an appeal, Lord Chancellor (on great consideration) was of opinion that J. S. was entitled to be tenant by the curtesy of the equitable estate of the wife, and so reversed the decree at the Rolls as to this point.

is nobody; and if this matter of mortgagees is not an interest in equity only, but properly a real estate, then the real property will be sunk and vest no where, if not in the mortgagee. If a man by his will devises lands, and afterwards mortgages in fee those lands, at law it is considered as a revocation of the *total devise*, but in equity only a revocation *pro tanto*, amounting to the same thing as letting in a charge upon the land, and when the mortgage is paid the devise takes place. The ownership of the land does always vest in the mortgagor or mortgagee. That an equity of redemption is no otherwise a right of *action* than every trust, and as there can be no benefit had of an equity of redemption but by sub-junction out of this court, so in the case of every *mere trust* in lands which is considered as a real estate in this court, but cannot be come at without a subpoena. To say that it is a mere right of *action* is by consequence to say, that the estate in the land is in nobody, and this determines the question; for if a mortgage is but a *chose en action*, this affirms that the equity of redemption is the real ownership of the estate; and this will determine the point between them. It is true that a mortgagee is not barely a trustee for the mortgagor, but it is sufficient for the present purpose if he is in part a trustee for the mortgagor; and it is most certain, that as to the real estate in the land the mortgagee is only a trustee for the mortgagor till foreclosure.

A mortgagee is only owner, as a charge or Incumbrance, and entitled to hold as a pledge, and as to the inheritance descended and real estate in the land, the mortgagee is a trustee for the mortgagor till the equity of redemption is foreclosed. Secondly, What is requisite to entitle the husband to be tenant by the curtesy? And his lordship said at law four things are necessary to make a tenancy by the curtesy, (*viz.*) marriage, having issue that may inherit, death of the wife, and seisin of the wife, Co. Litt. 30. a. Here it is admitted that the three first did concur; but the objection relied on is, that there was no actual seisin of the wife during the coverture, which is contended to be as necessary in respect to an equitable estate as of a legal estate; and it is admitted that the wife had no actual seisin of the legal estate, either in fact or in law. Here is no dispute whether actual seisin in consideration of law, but all that is, beside the present question, for the proceedings are upon a supposition, as no such thing as tenant by the curtesy. But the true question upon this point is, Whether there was not such a seisin or possession in the wife of the equitable estate in the land, as, in consideration of equity, is equivalent to an actual seisin of a legal estate at common law? And his lordship said, that in consideration of this court he was of opinion there was such a seisin of the wife in the present case of the equity of redemption, and said he had shewn that a person entitled to the equity of redemption is owner of the land of the legal estate; and if so, there must be a seisin of the legal estate; and what other seisin could there be than what J. S. and his wife had in the present case? for here is a mortgage in 1728 by Ann, who in 1729 married J. S. and in 1731 died, leaving issue a son, and the wife was all along in possession till her death, and the mortgagee did not come into possession till after her death, and there is not any foreclosure; and though the possession of the wife was but as tenant at will to the mortgagee, yet it was in equity a possession of the real owner of the lands subject only to a pecuniary charge on it, and from thence his lordship thought it clearly followed that there cannot be a higher seisin of an equitable estate. That the husband might be tenant by curtesy of this equitable estate of the wife, his lordship cited *Williams and Wray*, 2 Vern. 680. and *Sweetapple and Bindon*, 2 Vern. 536. (1); and his lordship observed, that there had been two objections made by the plaintiff; first, That the husband had it in his power to have had seisin in his wife's lifetime, for he might have paid off the mortgage; and therefore it was his own laches that he did not. Secondly, That a wife shall not be endowed with an equity of redemption. As to the laches in J. S. it is compared to the husband's not making an entry at law; but, his lordship said, the comparison will not hold, for it is not so easy to pay off the principal and interest due on a mortgage as it is to make an entry at law, nor is it to be done so speedily; for a mortgage in most cases is allowed six months notice to be paid; and his lordship said, in the case of *Sweetapple* the husband might have brought his bill in his wife's lifetime, to compel the laying out the money in the purchase of land; but though he omitted so to do till after the wife's death, yet that was not objected to him as laches: And it being said that this would encourage the husband to let the interest run on the mortgaged premises, which would perhaps swallow up the whole estate, his lordship said he could not find the force of this ground; for if he is owner of the estate, she was owner of the fee; that if by this is meant the interest, that became due in the wife's lifetime. The husband has nothing to do with it, because the interest that he claims does not arise till the wife's death, and he therefore is not to pay interest that was due before his title accrued. But by this is only meant the interest from the wife's death: During the tenancy by the curtesy the heir will have the same remedy as in case of a tenancy for life if an incumbered estate; for in all such cases the tenant for life keeps down the interest—As to the objection of the wife's not being endowed of an equity of redemption on a mortgage in fee, and that therefore an husband ought not to be tenant by the curtesy of an equity of redemption, his lordship said that this proves too much, for it has been determined that a wife shall not be endowed of a trust estate, yet that the husband shall be tenant by the curtesy of a trust estate (2). That the argument from *dower to curtesy* fails in this case; perhaps it may be hard to find out a sufficient reason how it came to be so determined in one case and not the other, but that it was safe to follow former precedents, and what are settled and established, and if such

(1) *Watts v. Ball*, 1 P. Wms. 108.

(2) *Chaplin v. Chaplin*, 2 Eq. Abr. 534. pl. 11. 3 P. Wms. 233.

precedents should be departed from, his lordship held it fit rather that the wife should be allowed her dower of a trust estate, and not that a tenancy by curtesy of a trust estate should be taken away; and said it may be, refusing to allow the wife dower of a trust estate was because she could not have it at law, and that it was founded on the maxim of *aquitas sequitur legem*; but whatever the reason of such a refusal was, the husband is allowed to have a tenancy by the curtesy of a trust estate, may even of money directed to be laid out in land, though not actually laid out, as in the case of *Sweetapple*. Upon a mortgage for years, a wife shall have aid of equity of redemption, which she could not have of a trust estate. If tenant by the curtesy of money to be laid out in land, by analogy, it ought to be so of an equity of redemption, especially where the wife continues in possession of the mortgaged lands all her lifetime.—There was a case put for the plaintiffs by way of illustration, viz. Suppose that a feme sole conveyed lands to J. S. in fee, upon condition that if at such a day she paid such a sum of money to him or his heir, that then she might re-enter; she afterwards marries and has issue, but before the day on which the condition was to be performed she dies, and after her death her heir pays the money—whether the husband would be tenant by the curtesy? And per his lordship—If this is meant as a mortgage to make a security, then it is the same as the present case; but if it is meant of a mere purchase, subject to a re-entry at common law on payment, undoubtedly the husband would not be tenant by the curtesy, for that were to make him tenant by the curtesy of a condition; for taking it as a purchase, the wife had, in that case, no estate or seisin in re or right *ad rem*, till the performance of the condition. As to a condition or power of revocation, these stand upon different reasons.—And for these reasons, upon the best consideration, his lordship decreed as above.

8 Dec. 1738, cor. Hardw. C.
Roberts v. Dixwell, 1 Atk. 607.

Where a trust is executory and to be carried into execution, equity will direct a conveyance of lands according to the rule of the common law, though the lands be *gavelkind*.

* Lord Hardwicke thought that this devise to the wife for her separate use would not bar the husband, because here is a sort of seisin in the wife (1), and Lord Coke says that to make a tenancy by the curtesy there ought to be a right in the husband inchoate in the life of the wife, but he does not say that he should be seised of the rents and profits.

(a) *Vide* *Cashborne v. Scarfe* and *Inglis*, 2 Atk. 603.

(b) *Vide* *Trodd v. Downes*, 2 Atk. 304.

(1) *Vide* *Hearle v. Greenbank*, 3 Atk. 716.

25 Feb. 1739, cor. Hardw. C.
Sterling v. Penlington,
7 Vin. Abr. 149 pl. 7.
14 Vin. Abr. 522. pl. 5.
2 Eq. Abr. 730. pl. 7.

Where one enters, claiming the whole for himself in exclusion of his companion, this may not serve as the entry of his companion, being made directly

11. Sir R. S. by will directed his trustees to convey a full fourth part of all his freehold lands, &c. to the use of his daughter *Priscilla* for life, and so as that she alone*, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said *Priscilla* for ever. Held that this was an executory trust, and that the wife took an estate for life only, and therefore that the husband was not entitled to be tenant by the curtesy. *Secus*, had it been an estate tail, for then the husband would have been tenant by the curtesy, though the court would have prevented his intermeddling with the rents during the wife's life.

In the case of a trust estate for payment of debts, or in the case of an equity of redemption, a husband may be tenant by the curtesy (a) of an estate devised to the wife for her separate use; for in a trust for payment of debts it is only a chattel interest in the trustees (b), and the first taker has a freehold over.

12. A. died, leaving a wife, a son, and daughter; the widow entered upon the estate, and was seised as tenant in dower of one part, and as tenant in common with her son in another part, and of a third part as guardian in socage to her son. The son died beyond sea, under age, whereby the daughter became entitled, who, during her infancy, married plaintiff; and they applied to the mother

to be let into possession of the son's part, which the mother refused, imagining the son was still alive, and thereupon to hold the land for him. Upon this they brought a bill for an account, which was directed; then the daughter died; and upon the husband's application to the court, one question was, Whether the seisin of the mother, (after the son's death) being tenant in common with the daughter, was the seisin of the daughter sufficient to make the husband tenant by the curtesy of her part: and Lord Chancellor held it was, for the entry and possession of one tenant in common, is the entry and possession of the other. Decreed for the husband.

against him; but that is not this case; for the mother's keeping possession of the whole against the daughter and her husband was entirely owing to a mistake in imagining her son was still alive, and not with any intent to exclude the daughter from her right; and therefore no inference can be drawn from it. Per Ld. Chancellor in *S. C.*

13. Devise to *A.* and her heirs; and, if she die before her husband, he to have 20 *l.* a year during life, remainder to go to her children: *A.* died before her husband. It is a rule, said the court, in the case of a tenancy by the curtesy, as well as in a tenancy in dower, that the estate shall come out of the inheritance, and not out of the freehold.

A tenancy by the curtesy, and a tenancy in dower, are excrescences out of the inheritance; and a continuation of the inheritance for a certain time in the husband, which would otherwise have ceased. A tenancy by the curtesy must arise out of the inheritance, which must vest in the wife; and there must be a possibility of its descending upon the children: now they take here by virtue of the remainder over, not by descent from the mother; and there is no difference between making an estate of inheritance to cease in the wife the moment she dies, and to arise in the children, and a jointtenancy.

Neither a tenant in dower or curtesy can entitle themselves to an estate in dower or curtesy, where the children who are left cannot possibly take an inheritance; for the moment of time the husband takes as tenant by the curtesy, the inheritance must descend upon the children, and therefore it is impossible in the present case to maintain that the father is tenant by the curtesy (*a*).

14. Plaintiff in this case sought by his bill the redemption of a mortgage made so long ago as in 1713. A tenancy by the curtesy (*int. al.*) was set up as an excuse to save the right of redemption. *sed non allocatur per curiam*—For there would be

25 July 1740, cor. M. R.
Sumner v. Partridge,
2 *Ath.* 47.

(a) *Vide Paine's Ca.* 8 Co. 34.
Co. Litt. 29. (b.)

2 July 1742, cor. Hardw. C.
Ason. 2 *Ath.* 333.

no bounds to a redemption, and no mortgagee could ever be quieted in his possession if this were allowed. It is of no consequence to the mortgagee, who had the equity of redemption; for if they do not make use of that right they shall be barred.

2 Mar. 1746, cor. Hardw. C.
Inledon and others v. Northcote,
 3 Atk. 436.

15. Where a husband is but tenant by the curtesy, and has only a life interest in the wife's estate, he cannot affect that estate without her joining.

1 April 1747, cor. Hardw. C.
De Grey and others v. Richardson
 and others, 3 Atk. 469.

(a) This was an estate of which the wife's brother was seised in tail, and which descended upon his sister in tail general.

16. Lands on which there were leases for years existing, and a rent incurred, descended on a wife (a), as tenant in tail general, who survived three months after the rent day incurred; though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy.

But, said Lord H., supposing the wife had died before the quarter day, the husband would in that case have been tenant by the curtesy, because he could do nothing till the rent day came, and the law never requires a man to become a trespasser. There is not, said his Lordship, a stricter case of *possessio fratris* than the present, and yet Lord Coke says (b), if the eldest son die before entry or receipt of rent, the sister of the whole blood shall inherit, and not the brother of the half blood (c); and *actually seised* is the same thing as seisin in a deed, and the wife in this case was actually seised. All that remains is, the laches in not receiving or distraining for the rent that became due. The receipt of rent would have amounted to evidence of an actual seisin; but no rent has been received either by the wife or any other person since the death of her brother, and therefore is a strong case to make the husband tenant by the curtesy, as the possession of the lessee was the possession of the wife; and there could be no other without making the husband a trespasser. Decreed, the husband is entitled to be tenant by the curtesy of all such lands as descended to his late wife in tail, whereof any leases for years were existing at testator's death, which continued till the death of the wife; but the husband is not entitled to be tenant by the curtesy of any part of such lands, whereof no such leases for years were existing and continued as aforesaid.

(b) Co. Litt. f. 8.—15. 2.

(c) Rule—*Possessio fratris facit fororem esse hæredem*.

17. A sum of money was agreed by marriage articles to be laid out in land, to the uses of husband and wife for life, remainder to the children as they should appoint, and in default of appointment equally; and if but one, to that one child in tail, with reversion to the husband in fee. There was issue only one daughter. The trustee paid the money to her and her husband. Held, that this daughter not being *sui juris*, nor separately examined, the payment was not sufficient to make it considered as money. Decreed, therefore, that it should be considered as land, and that a sister of the half blood (who was a daughter by a second marriage) may claim the reversion in fee from the father (a), but that the husband of the other sister, who was tenant in tail, will be tenant by the curtesy (b).

9 Dec. 1748, cor. Hardw. C.
Cunningham v. Moady,
1 Ves 174.

(a) *Vide* Kellow v. Rowden,
3 Mod. 253. and Cath. 126.
Show. 244.

(b) *Sweetapple v. Bindon*, 2 Vern. 536.

18. A. devised land in trust for the sole and separate use of his daughter (a feme covert) for life, and to be at her own disposal, with power notwithstanding her coverture to dispose thereof. When only nineteen, in pursuance of her power, she disposed of it by will. Held that this was not a good execution of the power as to the real estate, but that it may be claimed by the heir at law, although at the same time claiming a legacy: nor is the husband entitled to be tenant by the curtesy.

3 Aug. 1749, cor. Hardw. C.
Hearle v. Greenbank,
1 Ves. 299. 3 Atk. 716.
Although in *Calburn v. Inglis*,
7 Vin. Abr. 156. pl. 23. it was
said to be determined that a hus-
band may be tenant by the cur-
tesy of a trust in equity; yet,
first, the wife must have the in-
heritance; and, 2dly, There
must be a seisin of the freehold
during the coverture.

19. Testator by his will gave a sum of money to be laid out in land, for a place of retirement for his sister, and "to be for ever entailed on her issue." At the testator's decease his sister had three daughters. The husband of one of the daughters is entitled, as tenant by the curtesy, to one third of this sum, and of the land to be purchased there-with.

M. 1791, cor. M. R.
Dadson v. Hay,
3 Bro. Ch. Ca. 404.

Vide *Sweetapple v. Bindon*,
2 Vern. 536.

20. Testator, a tenant in tail with power to lease, remainder to B. the wife of C., made leases exceeding his power, conceiving himself to have obtained the fee. He afterwards made his will, and devised some benefits to B.; but B. elected to take her estate tail in opposition to the will. After her death C. claimed as tenant by the curtesy, though he also derived and had accepted benefits under testator's will. C. brought ejectments against the lessees, some of whom had expended considerable sums on their tenements. Lord Chancellor held that the lessees could not raise an equity

24 May 1797, cor. Thurlow, C.
Earl of Darlington v. Pulteney,
Lady Cavan v. Pulteney,
2 Ves. jun. 544. 3 Ves. jun. 384.
Vide S. C. more at large, ante,
tit. Baron and Feme, §. 10. pl. 23.

against C., holding as tenant by the curtesy under B.'s election to take her estate tail; but he retained the bill filed by the lessees, in order that they might, when they had ascertained their damages, have satisfaction from the testator's assets.

C—u GENERAL REFERENCES.

Custom, see *Prescription*, *Time*.

Customs, *Duty of*—*Revenue*.

——, *Manerial*—*Coppbold*.

——, *local*—*Local Laws and Customs*.

——, *foreign*—*Foreign Laws and Customs*.

——, *of Merchants*—*Trade*.

——, *of London*—*London*.

——, *of York*—*York*.

Church—*Ecclesiastical Persons and Things*.

——, *Wardens*—*Parish*.

Club—*Society*.

Curacy and Curate—*Ecclesiastical Persons and Things*.

D—e

Debts, Debtor and Creditor.

SEC. 1. How far Creditors are favored in Equity, and what Conveyance, Assignment, or other Disposition of Property shall be deemed fraudulent as against them.

P. 1682, cor. Nottingh. C.
Jones v. Purefoy, 1 Vern. 47.

1. LORD Chancellor in this case declared, that where a man had a just debt due to him, if he could in any case, even by the strictest and most

§ 1. Debts, Debtor and Creditor.

D—a 423

most precise rules of the court, get any advantage of an heir, &c. he would never be instrumental in depriving him of that advantage.

2. A wife joined with her husband in a mortgage, and levied a fine with intent to bar her dower; and in consideration thereof, the husband agreed the wife should have redemption of the mortgage; and the husband afterwards mortgaged the estate twice more: the subsequent mortgagees brought their bill to set aside the agreement as fraudulent (a) against them, which was decreed; but the wife had her dower secured to her.

3 Feb. 1684, cor. North, C. S.
Dolin v. Colman, 1 Vern. 294.
1 Eg. Abr. 148. pl. 1.

(a) *Vide* 13 Elix. c. 5.

3. A woman living apart from her husband, and having a separate maintenance, contracts debts. The creditors, by a bill in equity, may follow the separate maintenance whilst it continues, but when that is determined by her husband's death, they cannot by a bill charge her jointure with those debts; and the rather, for that the executor of the husband in this case, who may have paid the debt, is not made a party. Bill dismissed.

P. 1685, cor. Guildford, C. S.
Kings v. Delawall, 1 Vern. 326.
1 Eg. Abr. 68. pl. 2.

4. Equity will in some cases carry a debt beyond the penalty, as where a man is kept out of a debt by an injunction to stay proceedings at law; but a plaintiff in equity cannot charge the defendant beyond the penalty, any more than he can at law.

M. 1685, Cane.
Hale v. Thomas, 1 Vern. 350.
Vide 2 Ch. Ca. 182. 186.

5. Plaintiff having obtained judgment against defendant on a bond for 700*l.*, complained by his bill, that defendant, in order to defraud him, had assigned his estate to trustees, and had lent 1200*l.* to *R.* (since a bankrupt) in the name of one *E.*, but in trust for himself. The bill sought a discovery of the matter, and that a dividend under *R.*'s commission might be postponed till the question was determined. Defendant demurred, for that in his lifetime he was not bound to discover his personal estate, and for that the bill was in nature of a foreign attachment, which the court could not countenance. Demurrer over-ruled.

P. 1686, cor. Jeffries, C.
Smithier v. Lewis, 1 Vern. 398.

6. Plaintiffs were bond-creditors of one *C.* who was tenant for life of a considerable estate. *C.* had absconded and was outlawed. Defendant purchased *C.*'s life-estate at an under-value, pending the

T. 1687, cor. Jeffries, C.
Harna & al. v. Mierus,
1 Vern. 465.

the prosecution and with notice of it. It appeared also that defendant was a trustee in C.'s marriage settlement. Decreed, that defendant should convey upon payment of his principal and interest, and that all the creditors who were in equal degree should be let in *pro rata*, paying their contribution; and that the defendant might not longer stand any hazard in case C. should die, the plaintiffs, and such creditors as should come in, were ordered to give security to redeem the defendant within three days.

Quære the equity of this decree? It seems incompatible with the Chancellor's own reasoning on the subject. His lordship observed at the hearing, that, the purchase was at a great undervalue, huddled up in haste, when C. was concealed from his creditors. Defendant was trustee in C.'s marriage settlement, and for him to buy up the husband's life estate, and take away the support of his wife and children, and all this with notice of C.'s debts, and the proceedings against him was an ill circumstance, and ought to have some weight. His lordship added, that though the plaintiff's securities were not such as to affect the land, yet the notice was such; and if C. had been a trader his absconding would have made him a bankrupt, and then defendant must have lost all his money. At law, where a conveyance is found to be fraudulent the creditor comes in and avoids all without repayment of any consideration-money in equity; therefore, where the court can decree back the principal and interest there is no hurt done. A lesser matter in such a case would serve to set a conveyance aside.—*Dict. per Lord Chancellor*, in S. C. and yet decreed as above.

T. 1690, Canc.
White v. Hufsey & al.
Prec. in Cb. 14, 15.
2 *Eq. Abr.* 478. c. 2.
2 *Cb. Ca.* 46.

7. If a conveyance be fraudulent as to creditors, equity can set it aside without previously sending the question to be tried at law.

P. 1691, Canc.
N'cor v. Rycault, *Prec. in Cb.* 22.
2 *Eq. Abr.* 51. pl. 1. 478. pl. 3.
Vide Gilb. Ch. 275. *Prec.*
in Ch. 101. 2 *Atk.* 417. 2 *Stra.*
738.

8. A husband who had made no provision for his wife, whom he had stolen, agreed that her fortune, which was considerable and in trustees' hands, should be laid out in the purchase of lands to be settled on them and the heirs of their bodies. This agreement, though accompanied by a judgment and after marriage, *not to be considered as voluntary* so as to be set aside in favour of a creditor of the husband.

P. 1692, cor. Lds. Comrs.
Hungerford v. Earle, 2 *Vern.* 261.
1 *Eq. Abr.* 148. pl. 2.

9. A man made a voluntary settlement on trustees to raise money to pay his debts therein mentioned, and portions for his younger children, reserving to himself 50*l.* a year for his life, remainder of the whole to his son for life, remainder over: he continued in possession, and 12 years after contracted other debts by bond; upon a bill by the bond-creditors a question arose, Whether this settlement was fraudulent as to them? Decreed, that the settlement was fraudulent, and that the bond-creditors should have relief; for the trustees did not enter and take possession according to the settlement, but permitted the father to remain in possession; and a deed not fraudulent at first

may

§ 1. *Where favored in Equity, &c.*

D—e 425

may afterwards become so by being concealed or not pursued (a).

(a) This apparent decision of the principal case in equity is in the language of Ld. Commissioner Hutchins; but it seems that the other two Commissioners differed; wherefore the question was sent to be tried at law. The result does not appear.

10. Bill by a creditor against *B.* for a discovery of the estate of *J. S.*, supposed to be in his hands. *B.* demurs, because no executor or administrator is a party. Held good; for if no person will administer, a creditor may; and it is necessary the executor or administrator should be a party, because they may perhaps shew how the plaintiff's demand is satisfied.

M. 1693, Canc.
Conway v. Stroude, 2 Freem. 188;
2 Eq. Abr. 77. pl. 3.

11. A bond-creditor shall have the benefit of all counter-bonds or collateral securities, given by the principal to the surety: as if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover his debt.

M. 1692, Canc.
Maure v. Harrison,
1 Eq. Abr. 93. pl. 5.

12. The plaintiff was indebted to the defendant upon two notes, and the defendant obtained judgment at law against him for the money; and then desiring the defendant's forbearance, he told him that if he would procure one *Defoy* to give him his note for the money he would accept of it and acknowledge satisfaction on the judgment, and deliver up the plaintiff's notes: and being to go forthwith out of *England*, he left the plaintiff's notes with his agent here, to be exchanged for *Defoy's*, in case plaintiff procured them. Plaintiff accordingly procured two notes payable to defendant, which he delivered to the defendant's agent, and took up his own notes; and the attorney staid all further proceedings, but would not acknowledge satisfaction on the judgment, having no orders for it from his client. Before *Defoy* paid any of the money, he failed; and then the defendant proceeded at law upon the judgment; whereupon plaintiff brought his bill to be relieved, and suggested he had discounted the money with *Defoy*, and made him satisfaction; but he made no proof thereof, and therefore his bill was dismissed by the M. R. And on appeal to the Lord Keeper this decree was affirmed.

H. 1700, cor. Wright, C. S.
Grubar v. Gairand,
2 Eq. Abr. 146. pl. 10.

13. *A.* is tenant for life of the manor of *D.*, subject to a mortgage of 15,000*l.* to *B.*; remainder to

P. 1701, cor. Wright, C. S.
cum. assit.
Blake v. Hungerford,
to

Proc. in Ch. 158.

2 *Eq. Abr.* 256, pl. 2.

(a) *A.* was seized in right of his wife of the manor of *D.*; she joined with him in a fine, and then the uses were declared to *B.* by way of mortgage for securing 15,000*l.* and subject thereto to the use of *A.* for life, remainder, &c. as above. *MSS. Rep. acc.*

to his wife in fee (a). *A.* acknowledges a statute to *C.* for 500*l.* then the wife dies; and afterwards *A.* sells his estate for life to *J. S.*, the son and heir at law of the wife, for 3000*l.*, who had no notice of the statute to *C.* The 3000*l.* was borrowed by *J. S.* of *D.*, who paid off the 15,000*l.* and took an assignment of the mortgage for the 15,000*l.* and also charged with the 3000*l.*, and *J. S.* covenanted to pay the money, and the equity of redemption was limited to him; and *D.* covenanted on payment, to assign to *J. S.* or as he should direct. Then *J. S.* acknowledged a statute to *E.*, who had no notice of the 500*l.* statute to *C.*, and *J. S.* afterwards devised the lands to the said *A.* charged with legacies. Decreed, that *C.*'s statute must come in after the creditors and legatees of *J. S.*; but *E.*'s statute must come in immediately after *J. S.*'s legacies.

P. 1702, cor. Wright, C. S.

Bateman v. Bateman,

1 *Eq. Abr.* 149, pl. 6.

Proc. in Ch. 198.

Vide 2 *Atk.* 430.

(b) 3 & 4 W. & M.

14. A man binds himself and his heirs in a bond, and dies, leaving a real estate to descend to his heirs; and the heir having aliened the real estate, the obligee brought a bill against the heir and purchaser, to be relieved on the statute against fraudulent devises (b): and Lord Chancellor relieved him.

H. 1704, cor. Wright, C. S.
Fletcher & al. v. Lady Sidley & al.

2 *Vern.* 490.

1 *Eq. Abr.* 148, pl. 4.

15. *A.* made a bill of sale of his goods to a trustee, for one who lived with him as his wife, and was so reputed. This bill of sale was set aside as fraudulent against creditors.

If a man purchases a freehold estate to himself for life, remainder over to another; such remainder shall not be fraudulent even as to bond or judgment creditors. It is a new pretence to say a man made a purchase fraudulently. A man may alien to defraud his creditors, and thus the statutes against fraudulent conveyances will reach; but as to purchasing, a man may do it or not at his pleasure, may purchase for years, or for life, or in tail, or in fee, as he pleases, and may take in what remainder-man he chooses. To this opinion Lord Keeper inclined, and that fraudulent conveyances are made so only by the several statutes enacted for that purpose, as the statute of Merton, where the father enfeoffs his son and heir apparent to defeat the lord of his wardship, &c.

A. also purchased a lease in the name of a trustee, who declared the lease was made in trust to permit *A.* to receive the rents during his life, and then for his reputed wife. This lease will not be assets of *A.*, nor liable to his creditors after his death; for when a man purchases he may settle the estate as he pleases.

T. 1705, cor. Cowper, C. S.

Steward v. Rumball,

2 *Vern.* 509.

To this decision the reporter makes a query.

16. A man has judgment for the penalty of a bond, though the principal and interest exceed the penalty; yet he shall recover no more, for a man can have no more than his debt, and the penalty is the utmost of the debt.

§ 1. *Where favored in Equity, &c.*

D—c 427

17. *A.* conveyed lands to the use of himself for life, with power to mortgage such part as he should think fit; remainder to trustees to sell and pay all his debts. *A.* then died, indebted by judgments, statutes, bonds, and simple contracts. A question arose, Whether the creditors by judgment and statute should be preferred to creditors by bond and simple contract, or be paid in average with the other creditors under the deed? *Per curiam.* The deed of trust is fraudulent as against creditors by statute and judgment: First, because *A.* continued in possession and kept the deed in his custody, and might produce it or not as he pleased, and the creditors had no notice of it; and secondly, having reserved to himself a power to charge the estate with what sums he thought fit, he might have charged it to the full value, which amounts in effect to a power of revocation, and therefore fraudulent, as against creditors by statute and judgment.

T. 1705, Cane.
Tarback & al. v. Marbury & al.
2 Vern. 510.
1 Eq. Abr. 148. pl. 3.

18. Plaintiff having recovered judgment against *J. S.* (but had not issued execution) supposing some particular effects of *J. S.* to be in defendant's hands, brought a bill to discover them, in order to subject them to his judgment. Defendant demurs for want of equity, since no such bill would lie against the debtor himself, much less against a third person. Lordj Keeper seemed to agree it would not lie against the debtor nor against a third person for a general discovery, but only for particular things, as in this case. Demurrer over-ruled.

M. 1705, cor. Wright, C. S.
Taylor v. Hill,
1 Eq. Abr. 132. pl. 15.
Vide Angel v. Draper, 1 Vern.
399. *Smithier v. Lewis,* 1 Vern.
398.

19. If one by will or deed subject his lands to the payment of his debts, those barred by the statute of limitations shall be paid; for they are debts in equity, and the duty remains: the statute hath not extinguished that, though it hath taken away the remedy.

27 June 1707, cor. Cowper, C.
Anon. 1 Salk. 154.
1 Eq. Abr. 139. pl. 4.
Vide Goston v. Mill, 2 Vern.
141. *Andrews v. Brown,* Prec.
in Ch. 385.

20. *B.*, supercargo of a ship, having shipped sundry goods on board, borrowed 600*l.* of plaintiffs on bottomree, and also made a bill of sale of said goods, and of the profits to arise therefrom, in nature of a pledge for re-payment. The ship performed her voyage: the goods were sold and invested in other goods; and there were sundry barter and exchanges of goods. *B.* died at sea, homeward bound, and defendant, as a judgment creditor

H. 1709, cor. Cowper, C.
Bucknal & al. v. Roiffon,
Prec. in Ch. 285, 286, 287.
2 Eq. Abr. 256. pl. 3.
Vide Ryall v. Rowles, 1 Vef.
360. 1 Atk. 165. *Vide* 1 Burr.
467.

creditor for 1500*l.*, obtained administration before sale of the cargo, and as administrator took possession of all *B.*'s goods on the return of the ship. Bill by plaintiffs to have an account and discovery of the goods of *B.* and to have satisfaction of the profits. *Per Curiam.* The trust of the goods appeared on the face of the bill of sale. Though the goods were sold to plaintiffs, yet they trusted *B.* to sell them for their advantage, and *B.*'s possession of them was not to give a false credit, but for a particular purpose agreed upon at the time of the sale. It is true that in the case of a bankrupt, such a possession after sale would make the sale void against his creditors by the statutes, and so for other sales by the statute of fraudulent conveyances: but in this case the plaintiffs are presently entitled to the trust of these goods upon the sale, and to all the advantages consequential upon such trust, and may follow the goods for that purpose. Decreed, an account to be taken of the produce of those specific goods; and that the same be liable to make satisfaction to the plaintiffs. It was said at the bar, that the goods of *B.* were distinguished by marks, but if not, what fell into the bulk of *B.*'s personal estate generally, would be liable to go in a course of administration, and the defendant to be preferred in payment of his judgment before the plaintiffs.

M. 1709, cor. M. R.
Nightingale v. Lockman & Ux.
Mos. 231. Fitzgib. 148.
Vide Packer v. Windham,
Prec. in Ch. 412. cited in this
case. Oglander v. Bafton, 1 Vern.
396.

T. 1713, cor. Harcourt, C.
Loeffes v. Lewin,
Prec. in Ch. 370.
2 Eq. Abr. 226. pl. 5.
Gilb. Eq. Rep. 32.
1 Eq. Abr. 156. pl. 8.
Gilb. Ch. 297.
Vide Oxley v. Lee, 1 Atk. 625.

21. The portion of a lunatic, by order of court, was paid in to a Master, and the husband on making a settlement was to have it out: he made no settlement, but assigned the money over to his creditors, and died without issue; the wife survived, and died. The money was decreed to the creditors of the husband; for the payment to the Master was a payment to the husband, though the court would not let him lay his hands on the money, without making a provision for the wife; but she being dead without issue, his right was the same in equity as at law.

22. A man, on marriage of his wife's daughter, to whom he was indebted, but not to the value of the portion expected by the intended husband, makes him a verbal promise to pay him 4000*l.*, and pays him all but 1500*l.*, and some time after seals a bond to the husband for the 1500*l.* and shews it, together with his will, to the husband; but

but does not deliver it, but keeps it by him till his death, and then it is found with his will. He has several creditors by simple contract, who take out administration; and the husband becoming a bankrupt, his creditors exhibit their bill to have the benefit of the bond. Lord Chancellor decreed that this bond should be looked upon as voluntary, not being made in pursuance of any obligation in writing on the marriage, nor put into the power of the husband, and therefore fraudulent and void *quoad* the creditors, even upon simple contract, but good against any legacies, because a voluntary contract in the life of the testator is prior to the will.

23. A bill by a judgment creditor to open a decree of foreclosure, to which suit he was not a party, suggesting fraud and contrivance between mortgagor and mortgagee to cheat him of his debt. The mortgagee pleaded the decree of foreclosure and purchase of the equity of redemption, and by answer denied the fraud, but admitted he had notice of the judgment when he brought his bill to foreclose, but did not know the person who had got judgment, nor where to find him, and for that reason did not make him a party to the suit. The mortgagor by his answer admitted the mortgage, but said he was in prison at the time of the foreclosure, but owned he employed a solicitor to appear for him, &c.; that being very poor and necessitous, and in prison, he was prevailed on to assign his equity of redemption for 20 guineas, though the estate was worth a great deal more. *Per Lord Chancellor*—Since the mortgagee had notice of the judgment *before* the foreclosure and purchase of the equity of redemption, the plaintiff may go before the Master, and be at liberty to surcharge or falsify the mortgagee's account, but the mortgagee is not to account for the profits since the decree of foreclosure; and plaintiff being a judgment creditor and not a party to the bill of foreclosure, may redeem (a).

was ordered to give security for costs in case he did not redeem.

24. Bill by plaintiff on behalf of himself and other bond creditors of Lord J., who being indebted, had made a voluntary settlement upon his son of certain fee-farm rents. After the settlement Lord J. became indebted to other persons by bond. The scope of the bill was to subject the fee-farm rents

M. 176, cor. Cowper, C.
Bird v. Gandy,
7 Vin. Abr. 45. pl. 20.
2 Eq. Abr. 251. pl. 4.

(a) Note; In this case the plaintiff, being an obscure person,

H. 1717, Scaec.
St. Amand v. Lady Jersey, Administratrix, &c.
1 Com. Rep. 255.
Vin. Abr. tit. Voluntary Conveyances (D), pl. 6.

(a) 3 W. & M. c. 14. made perpetual by 6 & 7 W. 3. c. 14.

Shaw v. Lady Standish, 2 Vern. 327. Walker v. Burrows, 1 Atk. 93.

T. 1718, cor. Macclesfield, C.
Parslow v. Weedon,
1 Eq. Abr. 149. pl. 7.

T. 1718, cor. Cowper, C.
Wright v. Pilling,
Præc. in Ch. 404.
2 Eq. Abr. 257. pl. 8. 513. pl. 3.

rents to the bond creditor in like manner as if they had descended to the heir. Mr. *Vernon* had given an opinion that the conveyance being voluntary and for the benefit of a child, would be deemed fraudulent as against bond creditors, and the statute (a) for relief of bond creditors against fraudulent devises goes upon the supposition that a voluntary conveyance would have been fraudulent at law. If there had been no bond creditors at the time of the conveyance, it might have created a doubt whether it had been done to defeat bond creditors, but there being debts then owing by bond, he thought it would be void even against bond debts contracted after, or that if it were otherwise it would come to the same thing, since the estate in question is not to answer the bond debts prior to the conveyance; and if necessary, the latter bond debts would be admitted to stand in the place of the prior, and the assets so marshalled that all might receive a satisfaction as far as the assets would extend. Agreeable to this opinion the court decreed that the fee-farm rents should be sold for the benefit of the bond creditors, and that the trustees should all join in the conveyance.

25. Although by the statute of fraudulent devises a man is prevented from defeating his creditors by his will, yet any settlement or disposition he shall make in his lifetime of his lands, whether voluntary or not, will be good against bond creditors; for that was not provided against by the statute, which only took care to secure such creditors against any imposition which might be supposed in a man's last sickness: but if he gave away his estate in his lifetime, this prevented the descent of so much to the heir, and consequently took away their remedy against him, who was only liable in respect of the lands descended: and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can they be so when they are given away to a stranger.

26. A difference has always been taken between a general incumbrancer by statute or judgment and a purchaser or mortgagee, that the one is no lien on any particular part of the estate, but affects it only at large; but in case of mortgage or purchase, the party contracts for that particular part. That if a man had confessed twenty judgments or sta-

tutes,

§ 1. *Where favored in Equity, &c.*

D—e 431

tutes, the last could not by buying in the first hold out all the intervening judgments. Said *arguendo* by Mr. *Vernon* and agreed to *per cur.*, because when the debt on the first judgment was paid, that security determined and expired of itself. And Lord Chancellor and several at the bar thought that a judgment creditor might as well secure himself by taking a *prior* mortgage as the *third* mortgagee, for that his judgment was a lien upon the land, and when he gets in a *prior* mortgage, that ought not to be taken from him till payment of his whole debt.

27. S. having several young children, and being much in debt, conveyed part of his lands in trust for payment of his debts, and by another deed conveyed other part to trustees for maintenance of his children. This last conveyance being voluntary, was declared void as to creditors, but good against S. himself; and therefore if his creditors should fall upon those lands for a satisfaction of their debts, and thereby strip the children of their maintenance, the children should have a recompence out of the residue of the estate which S. had reserved to himself for his own maintenance; and compared it to the case where creditors that have a lien upon the land take their satisfaction out of the personal estate, which was liable to other creditors of an inferior nature, who have no lien upon the land: these creditors in equity shall stand in the place of the other creditors, who had a lien upon the land, and have a satisfaction out of that in their stead; this case is the same; for though the conveyance was voluntary in the father, yet he is bound by nature to provide for his children, and it is a sort of a debt.

28. On the marriage of the defendant, her intended husband being under age, and so incapable of making a settlement, the wife's father gave a bond for the payment of 1500*l.* on his making a suitable jointure on her, *without taking any notice whatever of the issue*. The marriage took effect, and the husband some years after on payment of the 1500*l.* made a settlement of 147*l.* *per ann.* on himself for life, remainder to his wife for life, with remainders to their first, &c. sons in the usual form. Plaintiffs were bond creditors of the husband, and after his death brought their bill against the

M. 1713, cor. Cowper, C.
Sneed & al. v. Lord and Lady
Culpepper,
7 Vin. Abr. 52. pl. 7.
2 Eq. Abr. 255. pl. 1.

M. 1719, cor. M. R.
Brunsdon v. Stratton,
Proc. in Ch. 520.
2 Eq. Abr. 260. pl. 3.

the wife and children to set aside this settlement, as *voluntary* and *fraudulent*, being made *after* marriage, especially as to the *children*, for whom *no provision appeared to be on the treaty* previous to the marriage, and that therefore they ought to be let in for a satisfaction of their debts. But his Honor was clearly of opinion, that this bond was not fraudulent nor voluntary against the bond creditors.

P. 1721, cor. Parker, C.
Holditch v. Miff, 1 P. Wms. 695.

29. Plaintiff was one of the late *South-Sea* directors, and had taken 400*l.* of defendant to put into *South-Sea* stock, which he did not do. Defendant brought an account at law for money had and received by plaintiff to his use, and recovered. Plaintiff brought his bill for an injunction, urging that the stat. 7 Geo. 1. c. 27. had vested all his estate in the trustees of the *South-Sea* Company, and had made a provision for payment of his debts out of his estate as a late director, and insisted that defendant should repair to the trustees, for that the legislature having disabled him from paying his debts, he ought not to be liable to an execution (a). But Lord Chancellor refused an injunction, saying, there was nothing of the act disclosed in the pleadings; or if there was, that act was not made in favour of the late directors. The trustees of the *South-Sea* Company however, by consent, paid the debt out of plaintiff's allowance under the act (b).

(a) This was compared to a case, *Ex parte James*, 1 P. Wms. 610. where a bankrupt having given up all his estate was arrested by a peevish creditor; and in that case the court not only granted an injunction but released the bankrupt.

(b) *Vide Hornby v. Houlditch*, cited in *Ludford v. Barber*, 1 T. Rep. 93. and *Auriol v. Mills*, 1 T. Rep. C. B. 433. and 4 T. Rep. 94. The principal case has also been applied in argument to those which have lately arisen respecting the American loyalist sued in this country by American creditors. *Kemp v. Antill*, 2 Bro. Ch. Ca. 11. *Wright v. Nutt*, 1 T. Rep. C. B. 136. and 3 Bro. Ch. Ca. 326. *Folliott v. Ogden*, 1 T. Rep. C. B. 123. 3 T. Rep. 726.

T. 1725, cor. King, C.
Wife's case, Sel. Ca. in Cb. 46.

30. A bond was given to the father-in-law of a second husband, but defeasance not to be put in suit unless misfortunes should happen to the husband. This bond was held *fraudulent* as to creditors.

T. 1725, Canc.
Soley v. Salisbury, 9 Med. 153.
2 Eq. Abr. 600. pl. 26.

31. A bill was exhibited by the creditors of a mortgagor to have the estate sold for the payment of their debts. Pending the suit, the mortgagee obtained a decree to foreclose. Decreed, that the creditors should redeem upon payment of the principal, interest, and costs, and that the land should be sold to pay the creditors. The account was referred to a Master.

§ 1. *Where favored in Equity, &c.*

D—e 433

32. *Equity will never countenance demands of an unfair nature*; as for attending at auctions as a puff to enhance the price of goods: nor will equity suffer them to be set up against just and fair demands. In an account, a cross bill for such purpose was dismissed, with costs.

6 Mar. 1726, Dom. Proc.
Walker v. Galsigne,
Gro. & Rud. L. 89.
2 *Eq. Abr.* 161. pl. 13.
13 *Vin. Abr.* 543. pl. 12. cited
from a MS. said to be Lord
Harcourt's.

33. *A. being much indebted, gave 600*l.* for the benefit of his younger children, only six hours before his decease.* This is not fraudulent as against creditors, though it would have been in the case of a real estate or chattel real, yet the court would not have taken it *pro confesso* to be so, but would have directed an issue.

14 July 1729, cor. King, C.
Duffin v. Furness,
Sel. Ca. in Ch. 77.
2 *Eq. Abr.* 423. pl. 27.

34. *Edward Parry covenanted to convey all his lands (part being in mortgage) to himself and his wife for their lives, and to the heirs of the marriage; remainder to Edward Parry, plaintiff's father, in tail male, who was a stranger both in blood and consideration; and he having no issue*, (and his wife being dead) devised the mortgaged premises to defendant, and died. Plaintiff brought his bill to have the covenant executed in favor of him; which was dismissed;—But it would have been otherwise, if such covenant had been in favor of children, creditors, or any such other good consideration; for though the making the agreement was voluntary, yet the cause of the motive inducing to it would be valuable and good.* So in favor of a purchaser, the seller, after purchase, being considered only as a trustee for the purchaser.

P. 1731, in Scacc.
Parry v. Hugbes,
2 *Eq. Abr.* 54. pl. 12.

* *Quere*, if it was not the co-
venantor who had no issue, and
whose wife was dead, as stated in
the text?

35. A freeman of London, upon his daughter's marriage, assigns 300*l.* to trustees, in trust to pay the interest to the husband, so long as he should continue in good circumstances; but if he should fail, then to be paid to the separate maintenance of the wife and children. The husband became a bankrupt, and the assignees brought a bill against the trustees to have the produce of the money paid to them during the husband's life. But the bill was dismissed with costs; for *per cur.* it is a reasonable and prudent settlement; and the most proper period for a father to provide for his children.

H. 1733, Scacc.
Lockee v. Savage,
2 *Eq. Abr.* 260. pl. 4.
2 Str. 247. nomine *Lockyer & a'.*
v. Savage & al. and *twich says*,
—It was held that the provision
for the wife's maintenance in case
the husband failed was good
against creditors; it not bring a
provision out of the bankrupt's
estate, but the settlement of the
wife's own fortune.

36. A woman indebted *dum solā*, marries, and brings a portion to her husband, and dies. Equity will

H. 1735, cor. Talbot, C.
Heard & Us. v. Stamford,
Ca. temp. Talb. 173. 3 P Wms 409.
2 *Eq. Abr.* 234. pl. 5.

VOL. II.

F f

Will

will not help the creditors against the husband to the value of what he received with his wife (a).

(a) Lord Chancellor, in pronouncing his decree in this case said, It is extremely clear that by law the husband is not liable to the wife's debts, unless contracted during coverture, except where the creditor recovers judgment against the husband in the lifetime of his wife; and, his lordship said, he did not see how any thing less than an act of parliament could alter this law. But the wife's choses en action are assets, and will be liable *pro tanto*. In *Freeman v. Goodham*, Cha. Rep. 295. there was some reason for the court to be provoked when the goods themselves continued after the wife's death in the hands of the husband, who notwithstanding refused to pay for them. It is true the Lord Chancellor over-ruled the demurrer, but what was afterwards done in the case does not appear (1). Neither in *Powell v. Bell*, Prec. in Ch. 256. (2) does it appear that any notice is taken of what estate the wife had in her own right, and what as administratrix to her husband. His lordship said if he relieved against the husband because he had a sufficient portion with his wife, he ought by the same reason to relieve a husband against whom a creditor had recovered judgment where he had no portion with his wife. If the law as it now stands be inconvenient it will be a good reason for the legislature to alter it (3); but till that is done equity cannot interpose, and the present law must take place. The next day the case of *Thomond v. Suffolk*, in 1718, 1 P. Wms. 466. was cited and insisted on in point, on the authority of which case Lord Talbot made his decree as before stated.—*Note*; *Jordan v. Foley*, Sel. Ca. in Ch. 19, 20, was determined by Lord King in 1725, on the same principle.

(1) The event of this cause appears in the register-book; it is the case of *Freeman v. Goodland*.—The defendant (in that case) married the testator's widow, who had bought goods of the testator's executors. After the widow's death, the executors bring their bill (*int. al.*) to be satisfied for these goods; the defendant demurred, and the demurrer was over-ruled (on 18 Dec. 1676). At the hearing of the cause (on 2 Dec. 1678) the defendant insisted that the wife had a property in these goods at the marriage, and that they were part of her portion; yet, to avoid trouble, (though he contended he was not liable) he offered to pay for the goods on having an assignment made to him of some leasehold estates mentioned in the cause, and the decretal order runs—"That the defendant *Goodland* do pay to the said "executors the sum of 350 *l.* reported due to them on account of the said goods according to his offer "aforesaid." This being a decree in consequence of defendant's offer, the point was not determined in this case; perhaps the defendant, not liking the appearance of his case on arguing the demurrer, was induced to make the offer mentioned.

(2) This seems to be the only case which is contradictory to the present point, though Mr. Vernon, of counsel for the plaintiff in this cause, said he had often known it to be so held, and that one precedent in favour of a creditor was worth three to the contrary.

(3) Notwithstanding the earnestness with which Lord Nottingham declared *he would alter the common law on this point*, being dissatisfied in the cause of *Freeman v. Goodland*, and the dissatisfaction Mr. Wentworth expresses in his *Office of Executors*, chap. 17 s. 1. the legislature does not yet see that it is a law grievous enough to be altered; for it still remains in *statu quo*, unchanged by any parliamentary interposition.

So on the other hand, where a woman indebted *dum solâ* marries and brings *no portion* to her husband, and a creditor of the wife when sole recovers judgment against him in her lifetime for the debt, and then the wife dies; equity will not relieve the husband against the judgment.

24 May 1736, cor. Talbot, C.
Bradley v. Powell,
Ca. temp. Talb. 193.
2 Eq. Abr. 253. pl. 13.

37. A. the father, and B. the eldest son re-settle an estate to the use of A. for life as to part, then to trustees for 200 years to raise 1100 *l.* to be paid to C. the second son within six years after A.'s death, or as soon after as the same could be raised; and in the mean time interest from A.'s death for his maintenance, remainder to B. the eldest, &c. C. died indebted, and two years after him A. died, from whom a good estate came to B. The creditors of C. cannot have this portion raised, the contingency

contingency upon which it was payable never happening.

38. Bill by the creditors of *W.* and *G. Hammond*, deceased, for a discovery of their freehold, copyhold, and personal estates, and to be relieved against the several settlements of several parts of their freehold and leasehold estates made *after the marriage* of *W. H.* with defendant *E. H.* without consideration, and fraudulent with respect to plaintiffs as creditors, and to have such estates sold in aid of others towards satisfaction of plaintiffs' demands. *Per Lord Chancellor*—There is no evidence of actual fraud to impeach the settlements. Plaintiffs insist that *G. H.* the father was largely indebted when he made the settlements on *W. H.* his son, and that therefore they are fraudulent under 13 *Eliz. c. 5.* which regards creditors only. This act must be considered as it is at law, and not be otherwise construed in equity. The creditors pray an application of the leasehold terms as assets in satisfaction of their debts. This is a case of general creditors, and therefore not so strong as a case of mortgagees, judgment creditors, or purchasers. If a man had *bona fide* paid his money for the purchase of the estate, it would have come within 27 *Eliz. c. 4.* and been utterly void (a). The three settlements in question are of one freehold and two leasehold estates, that bear equal date. *W. H.* the son married the daughter of *J. S.* without consent, and no settlement was made before the marriage. Afterwards *J. S.* proposed to *G. H.* the father to give his daughter a portion of 300 *l.* if *G. H.* would make an adequate settlement. A kind of survey was made, so that the settlement was not merely colourable. The consideration for settling the freehold is 200 *l.* paid: this is a fair transaction (b), and not impeachable. The second is a settlement of a leasehold estate called *Ford*, made in consideration of the marriage already had, and of 100 *l.* paid or secured to be paid. Upon this a question arose, Whether it should prevail against creditors? *Per Lord Chancellor*—There are many opinions, that every voluntary settlement is not fraudulent simply by reason of its being voluntary, but that it is an evidence of fraud only (c). There are cases where persons are not indebted at the time of making a voluntary settlement, and subsequent debts will

27 Nov. 1738, cor. Hardw. C.
Ruffell & al. v. Hammond & al.
1 *Atk.* 13.

(a) *Vide Walker v. Burrows*,
1 *Atk.* 94.

(b) *Vide Styleman v. Ashdown*,
2 *Atk.* 479.

(c) *Vide Bovey's case*, 1 *Vent.*
193. *Lord Tenham v. Mullens*,
1 *Mod.* 119.

(a) *Vide Shaw v. Lady Stan-*
dish, 2 Vern. 327. *Walker v.*
Burrows, 1 Atk. 93. *Middle-*
come v. Marlow, 2 Atk. 520.
Lord Townsend v. Windham,
2 Ves. 10. *Stephens v. Olive*,
2 Bro. Ch. Ca. 90.

(b) *Vide Beaumont v. Thorpe*,
1 Ves. 27 or if there are any
badges of fraud to deceive credi-
tors, as if a man make a settle-
ment with a view to his being in-
debted at a future time. *Style-*
man v. Ashdown, 2 Atk. 481.
Fitzer v. Fitzer, 2 Atk. 511.
Taylor v. Jones, 2 Atk. 600.

(c) This does not appear by
the register's book, and Lord
Hardwicke's reasons seem rather
to apply to freehold than to lease-
hold property in the Ford estate.

(d) This last settlement is but
very shortly stated in the re-
gister's book.

(e) *Vide Twyn's case*, 3 Co. 80.
Taylor v. Jones, 2 Atk. 600.

will not shake such a settlement (a); but there is hardly a case where a conveyance made by a person indebted at the time which has not been deemed fraudulent (b). Lord Chancellor would not enter into a nice disquisition whether every voluntary settlement is fraudulent, because as to the Ford estate there was a valuable consideration on the face of the settlement, for the father was tenant for life, and the son entitled to the reversion in tail (c). And it has been held in several cases, that where a father and son join in a marriage settlement, it is a bargain for a valuable consideration. It remains however a question, Whether it has been extended to creditors? In the present case the son could not have settled the residuary interest without the father's help, because he was tenant in tail in reversion and not in possession; but where a father is tenant for life, and his son is tenant in fee, and they join in a settlement, it is good against creditors; for the son might dispose of the residuary interest without the father's joining. In the last settlement of the other leasehold estate, Lord Chancellor said, there was a plain badge of fraud, for there G. H. the father took back an annuity to himself and his wife, which probably was the full value of the estate comprised in the deed, and therefore he gave his son nothing (d), which is almost tantamount to a continuance in possession, and a strong circumstance of fraud (e). Decreed, the settlement of the freehold estate, and of the leasehold estate called Ford, good against creditors, but that the leasehold estate comprised in the last settlement should be liable to the creditors, the same being fraudulent as to them.

12 Nov. 1739, cor. Hardw. C.
Harvey v. Harvey, 1 Atk. 563.

See this case at large, post. tit.
Power.

So will the court in the like
cases supply a defective surrender
or the want of a surrender of a copyhold estate. *Vide ante*, tit. Copyhold.

It seems now to be established, that the defect in the surrender of a copyhold, or in the execution of a power (which are governed by the same rules) shall be supplied only in favour of three descriptions of persons, viz. Creditors, a wife, and children. *Vide Goring v. Nash*, 3 Atk. 189. *Goodwyn v. Goodwyn*, 1 Ves. 228. *Byas v. Byas*, 2 Ves. 164. *Tudor v. Anson*, 2 Ves. 582.

(f) *Vide Pollard v. Grenville*, 1 Ch. Rep. 184. 1 Ch. Ca. 10. *Smith v. Ashton*, 1 Ch. Ca. 263. 1 Freem. 208. *Fothergill v. Fothergill*, 1 Freem. 256. *Sarth v. Blomfey*, Gilb. Rep. 166. *Coventry v. Coventry*, 2 P. Wms. 212. 1 Stra. 596. *Tollett v. Tollett*, 2 P. Wms. 439. *Cortez v. Laver*, 2 P. Wms. 622. *Holt v. Holt*, 2 P. Wms. 648. *Sirgelson v. Sealy*, 2 Atk. 414. *Tyrconnel v. Ancafter*, 2 Ves. 500. *Wade v. Paget*, 1 Bro. Ch. Ca. 363. *Sneyd v. Sneyd*, Amb. 64. *Saris* as to the non-execution of a power, *Arundel v. Philpot*, 2 Vern. 69. 3 Ch. Ca. 70. *Piggot v. Penrice*, Com. 250. *Coventry v. Coventry*, 2 P. Wms. 227. *Tollett v. Tollett*, 2 P. Wms. 490. *M'Adam v. Logan*, 3 Bro. Ch. Ca. 310.

39. A court of equity will supply a defective execution of a power, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors (f).

40. Where

§ 1. *Where favored in Equity, &c.*

D—e 437

40. Where there is a covenant for the trustees to convey the inheritance, this court will consider it as actually conveyed, and the term in the trustees as attendant only on the inheritance, and so connected together in the *cestui que trust* that it can never be severed in favor of an heir or executor, though it may in some cases on behalf of creditors.

22 Nov. 1740, cor. Hardw. C.
Cooke v. Cooke, 2 Atk. 67.
Vide Willoughby v. Willoughby, 1 T. Rep. 766. *Goodright v. Sales*, 2 Will. 331. *Villiers v. Villiers*, 2 Atk. 72.

41. Defendants set up a deed of trust of the estate in question, which was declared fraudulent against plaintiffs as judgment creditors, who now petitioned for an account of the profits *pendente lite* which defendants have received, and that defendants may account for such pertainance of profits from the filing of the bill. *Per Lord Chancellor*—If it had not been for the conveyance which the company have made for their own benefit, plaintiffs might have had an *elegit*, but that would have entitled them only to a moiety. As there are more judgment creditors than one, the court has a handle to direct an account of the profits from the time of the decree. The most usual case is for a judgment creditor to require against an heir at law an account of rents and profits received by him, considering them as the assets of his ancestor; for if he should bring an action of debt, he would have judgment for the value of the estate, and therefore equity decrees according to the judgment at law (a).

20 Dec. 1740, cor. Hardw. C.
Higgins & al. v. York Buildings Company, 2 Atk. 107.
Vide Higgins v. York Buildings Company, 2 Atk. 44. which seems to be a branch of S. C.

Where a mortgagor is left in possession, a mortgagee can never have an account of rents and profits for any past years during the possession of the mortgagor.

(a) *Vide Stileman v. Ashdown*, 2 Atk. 609.

Suppose a trust estate not amounting to a fraudulent conveyance by the party, yet the statute of frauds will help to make that estate liable to an execution.

It does not seem that in the case of a fraudulent conveyance, equity will do more than remove it out of the way. The court will not decree profits back against the original debtor and owner of the estate, received *pendente lite*, in favor of judgment creditors, from the filing of the bill, nor in any instance decree a sale, but will follow the law, and, without interference, leave them to their remedy by *elegit*.

22 Feb. 1742, cor. Hardw. C.
Fitzer v. Fitzer and another,
 2 Atk. 511.

Debts, Debtor and Creditor. § 1.

42. Lord *Rivers* by will gave an annuity of 50*l.* to the plaintiff, who afterwards in 1726 married the defendant *Fitzer*. In 1738 they agreed to part, and by a deed of separation the husband covenanted to allow her 14*l. per annum* out of his own estate, and 24*l.* more to be paid quarterly out of the annuity of 50*l.*, and 12*l. per annum* to his daughter for her maintenance, to be paid quarterly. The bill is brought against the husband and *Stephens*, a creditor of his since the execution of the deed of separation, to have the trusts of the deed performed. Lord *Hardwicke* decreed according to the prayer of the bill as against the husband: and as to *Stephens*, that he should not release his claim upon the annuity until the plaintiff had paid him his debt.

It was also a question in this case, Whether the deed of separation in 1738 and the trusts declared in it were fraudulent under the statute 13 *Eliz. c. 5.*? Per Lord Chancellor—Every conveyance of the husband that is voluntary, is fraudulent as against creditors; and though a husband is bound by law to maintain his children, yet the funds out of which the maintenance is to arise are liable to creditors.

The decrees of the spiritual court for alimony and maintenance are only against the person of the husband, but affect not the husband's estate so as to take it from his creditors.

8 Dec. 1742, cor. Hardw. C.
Stileman v. Astdown & al.
 2 Atk. 477. Ambl. 13.

(c) Which it seems was made in part performance of an agreement before marriage, and of 212*l.* the wife's portion.

43. Bill by an executor to have satisfaction from the estate of the late father of defendants, for a judgment given by him to plaintiff's testator for 120*l.* Defendant (the eldest son) protected himself under a settlement made after the marriage of his father and mother in 1694 (a), in which the father was tenant for life, remainder to the mother for life, remainder to defendant, first tenant in tail. In 1700 the father made a joint purchase with defendant, his eldest son, of 4*l. per annum* to them and their heirs. In 1708 the father made another purchase jointly with the other defendant, his second son, of 5*l. per annum* for 105*l.*, and settled it as a provision for younger children. The father paid the purchase-money of both estates, and continued in possession till his death in 1735. The sons afterwards entered on these estates. Plaintiff insisted that the settlement in 1694, being after marriage,

marriage, was voluntary, and that all the estates were subject to his judgment. *Per Lord Chancellor*—The settlement in 1694 being in consideration of a marriage portion paid down (as it appears) though made *after marriage*, cannot be impeached by subsequent creditors (a). As to the two joint purchases it is admitted that, in both cases, the consideration-money was paid by the father. Defendants insisted that the two purchases were to be considered with respect to a moiety, and on account of the survivorship as an advancement of them, and that they were therefore entitled to retain against the plaintiff's judgment. The general rule and doctrine has been admitted, that though the father pays the whole consideration, yet if the purchase is made in the name of a younger son, the heir cannot insist on it as a trust for the father (b). But the present case differs from that rule or any other, and Lord Hardwicke said, that where he could find a material difference he would incline to relieve a creditor; for though it may be proper *stare decisis*, yet the cases have gone full far enough in favor of advancements. There are some cases where a purchase has been singly made in the son's name, and the possession continued in the father, and yet held an advancement of the son; but the reason is, that the father is his natural guardian during his minority. In this case the purchase is in the names of father and son as joint-tenants; that cannot be an advancement, for the father takes possession of the whole till a division, and to a moiety afterwards absolutely, besides a chance of his being a survivor of the other moiety (c); nay, if the son had died a minor the father would have taken the whole by survivorship; for the son, as an infant, could not have severed the joint-tenancy (d). Suppose (said Lord H.) a father in a purchase should take to himself an estate for life, remainder to his son in fee: such estate would be liable to a creditor, the father having the profits for life and his son only a remainder (e). A material consideration for the plaintiff in this case is, that the father might have purchased in joint-tenancy, to prevent dower and other charges (f). Then how does it stand as to the creditor. A father here was in possession of the whole estate, and was necessarily the visible owner, so that the creditor by an *elegit* might have taken a moiety. This differs

(a) *Vide* Colvill v. Packer, Cro. Jac. 158. Anon. Prec. in Ch 101. Jones v. Marsh, Ca. temp. Talb. 64. Russell v. Hammond, 1 Atk. 13. 15. Brown v. Jones, 1 Atk. 190. Lanoy v. Athol, 2 Atk. 444. 446. Ward v. Shallet, 2 Vef. 16. 18. Hylton v. Biscoe, 2 Vef. 308. Wheeler v. Caryl, Ambl. 121.

(b) *Vide* Lamplugh v. Lamplugh, 1 P. Wms. 112. Grey v. Grey, 1 Ch. Ca. 296. Elliot v. Elliot, 1 Ch. Ca. 231. Mumma v. Mumma, 2 Vern. 19. Shales v. Shales, 2 Freem. 252. Bateman v. Bateman, 2 Vern. 436. Taylor v. Taylor, 1 Atk. 386. Hill v. Ballard, 1 Vef. 77.

(c) Pole v. Pole, 1 Vef. 76.

(d) *Vide* May v. Hook, Harg. Co. Lit. 246. a. n. 1.

(e) *Vide* contra, Fletcher v. Sidley, 2 Vern. 491. *Vide* Peacock v. Monk, 1 Vef. 129. The case here put by Lord Hardwicke (whether within 13 Eliz. c. 5. or not?) seems, however, to be within 1 Jac. 1. c. 15. relating to bankrupts, Fryer v. Flood, 1 Bro. Ch. Ca. 160. *Vide* also Crisp v. Pratt, Cro. Car. 548. 7 Vin. Abr. 97. pl. 2.

(f) Lit. f. 45.

it extremely from all the other cases. The court ought, if possible, to relieve a creditor; and what can be more favourable for the plaintiff than that the whole estate is covered by these purchases. If the court does not let him in upon these estates, he has no possibility of being paid. Lord Chancellor said, It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent, for if he does it with a view to his being indebted at a future time, it is equally so. Decreed, that the plaintiffs should be let in upon the estates jointly purchased by the father and son in this case (a). Decreed also, that the estate of defendant's father which was in mortgage, and a moiety of the two estates purchased in joint-tenancy, be sold; and that the produce of the mortgaged premises be first applied to the mortgage debt, and next towards satisfaction of the plaintiff's judgment; and if that should be insufficient, then the proceeds of the moieties of the two last-purchased estates should be applied in further satisfaction; and that the surplus of the estate purchased in 1700 should be paid to the elder brother, and of that purchased in 1708 to the younger brother.

On a re-hearing of this cause (18 June 1743*) Lord Chancellor said, that had it not been for the case of *Compton v. Pigot* (cited for the plaintiff) he should have thought it clearly for the defendant, the heir at law (b). The judgment affects the land as it is bound by the judgment. Equity follows the law; and as he can take only a moiety at law, he shall have no more in equity. Suppose it were the case of a bond-creditor, he might maintain debt against the heir, and get judgment upon the assets descended, for at law it is the debt of the heir (c), and the action is in the *debet et detinet* (d); but against the executor it is in the *detinet* only, and the heir cannot discharge himself but by pleading *riens per descent*. But if a judgment was obtained against the ancestor, a *scire facias* could not be brought against the heir, because at law he was not-bound, and there is no instance before the statute of *Westminster* (e) of a *scire facias* brought against an heir on such a judgment.

(a) *Vide Russell v. Hammond*, 1 Atk. 15. Lord Hardwicke on pronouncing this decree said, the principal case came very near the case of *Christ's Hospital v. Buddin*, 2 Vern. 683. where a husband lent out money in the names of himself and wife upon mortgages and bonds, and died. Harcourt, C. S. looked upon the wife in nature of a joint purchaser, and decreed that she was entitled to the mortgages and bonds against the heir at law; but admitted that in case of creditors it might be fraudulent.

* 2 Atk. 608.

(b) *Compton v. Pigot*, (cor. Harcourt, C. 14 Dec. 1711) was a case where a bill was brought by a judgment creditor against an executor, who was also heir at law, to have the personal estate applied first, and if not sufficient, then the real estate to be sold. The words of the decree in that case, to have the whole real assets sold *liable* to the judgment, were contended by defendant's counsel to admit of this doubt, Whether the decree does not confine it to such assets as are only *liable* to the judgment, and not to all assets descended upon the heir.—*Note*; There is a short account of this case (nomine *Compton* and *Compton*) cited in the principal case in *Ambler* 15.

(c) *Stonehewer v. Thompson*, 2 Atk. 441.

(d) *Keniston v. Clerk*, 2 Atk. 205. Dy. 344.

(e) Mr. Attorney-General for defendant *arguendo* said, that the statute of *Westm.* 2. (13 Ed. 1. c. 18.) which gives the *elegit*, means no more than to give the judgment creditor an election to come upon the lands of the cosutor for one moiety of his debt, and upon the personal estate for the other moiety.

§ 1. *Where favored in Equity, &c.*

D—e 441

judgment. Doubtless if it had continued a bond the whole assets in the hands of the heir would have been liable (a); but before the statute of *Westminster* there was no remedy against the ancestor in his life-time upon a judgment on his land, and it is that statute which subjects one moiety to the judgment creditor. The consequence is, that although the ancestor is dead the land falls into the hands of the heir or a purchaser equally bound, and the *scire facias* is brought against them as *terre-tenants*, by virtue of the statute (b). It was objected, that a bond-creditor would be in a better condition than a judgment-creditor, and so he is; for as soon as a bond-debt is turned into a judgment it is extinct against the ancestor, and the creditor cannot, in the life-time of the ancestor, bring any action upon the bond, neither can he bring an action against the heir after it is extinct, but still he obtains a great advantage by his judgment, *viz.* the opportunity of binding the land immediately, and a preference over all other bond creditors: and therefore it is that a judgment-creditor prefers this real advantage to the precarious one of assets descending upon the heir after his ancestor's death. In such case plaintiff has nothing to better his situation in equity more than at law, excepting that equity accelerates the payment by directing a sale of the moiety, and not letting him wait till he is paid out of the rents and profits. Equity however, cannot change the rights of the parties. As to the case of *Pigot v. Compton* Lord Chancellor observed, perhaps that case was not sufficiently considered, or perhaps a moiety of that estate, when sold, might be sufficient to discharge the judgment.

His Lordship affirmed his former decree of 8th December 1742.

44. *H. H.* was tenant (of a settled estate) for 99 years, if he should so long live, remainder to trustees to preserve, &c. remainder to his first and every other sons, remainder to his other sons in like manner, remainders over. *H. H.* and his son *C. H.*, being indebted, assigned this settled estate in trust for their creditors, and agreed to suffer a common recovery, to make the provision for the creditors more effectual. The creditors filed their bill against *H. H.* and his son, and against

(a) *Vide Higgins v. York Buildings Company*, 2 Atk. 107.

(b) *Vide Herbert's case*, 3 Co. 22. Dy. 81. pl. 62. 149. pl. 80.

31 Jan. 1743, cor. Hardw. C. *Woodhouse v. Hopkins*, 3 Atk. 22.

against the heir of the surviving trustee to preserve contingent remainders, to compel him to join in such common recovery. *Per Lord Chancellor*—Where the intention of a testator to preserve the limitations he has made as far as possible, is apparent, the court will effectuate this intent where the uses are executory. It was agreed that there is no precedent where the court, in such cases, has decreed the trustees to join, and Lord Chancellor said this was not a case where the court ought to do it (a). The father was made tenant for 99 years in order to preserve the estate, and it might likewise have been designed to prevent his having such an influence over his son, when of age, as to get him to destroy the settlement. Here the intention is to pay the debts of the father. The objection is, the trust is for the first tenant in tail, and that when the tenant in tail is seized of the freehold he has power to bar it and not before. Plaintiff argues that it is prayed to execute the trust of articles, truly so, but equity will not execute every trust created by the parties, and though the court might not condemn the trustee if he consented, yet the court will not compel a trustee so to do, and Lord Chancellor thought *the present* the very case which was intended to be prevented by the trust. Bill dismissed (b).

(a) *Vide Symance v. Tatton*, 1 Atk. 613. *Barnard v. Large*, Amb. 773. 1 Bro. Ch. Ca. 534.

(b) Lord Hardwicke mentioned *Townsend v. Lawton*, 2 P. Wms. 379. in support of this opinion.

13 June 1743, cor. M. R.
Taylor v. Jones, 2 Atk. 600.

45. This being a case between creditors on the one side, and a wife and children on the other, stood over for judgment till this day.

Defendant, the husband, had a legacy left to him after marriage of 1733*l.* stock, which (in 1734) was vested in trust for defendant for life, then for his wife for life, and then for his children. The simple-contract creditors of the husband brought their bill to be paid their debts out of this stock. *Per curiam*—Though such a settlement is good against the father, even after marriage, yet as to creditors for a valuable consideration it is a standing rule, that it is always looked upon as fraudulent and within 13 *Eliz. c. 5*. Is this deed then within the saving clause or proviso of the statute? There is no doubt, though this is upon a good consideration with regard to the person making it, it is otherwise as to creditors (c). In the present case here is a trust left to the husband in the first place under this deed, and his continuing

(c) *Vide Twyne's case*, 3 Co. 80. and *Upton v. Bassett*, there cited. *Vide also* 27 *Eliz. c. 4*.

ning in possession is fraudulent as to creditors. Next consider whether the debts contracted after the settlement made are included in 13 *Eliz.* (a). The preamble is for avoiding and abolishing of feigned covenous, &c. fraudulent feoffments, &c. which feoffments, &c. are derived and contrived, &c. to delay and defraud creditors and others of their just and lawful debts, &c. The word *others* seems inserted to take in all manner of creditors as well after as before the settlement, whose debts should be defrauded. The enacting clause is still stronger, for the word *creditors* is not mentioned, but the general words *person or persons*, &c. whose debts, &c. might be by such fraudulent practices, &c. disturbed or defrauded, &c. The words of the statute therefore seem to have been so general in order to take in all persons who shall be hindered or delayed: such being the intent it is highly reasonable it should be so construed, and there is no rule of law that hinders creditors after marriage from being paid, any more than creditors before marriage. Besides, it is very probable that the creditors after the settlement trusted the defendant seeing him in possession of the stock, and acting as the visible owner. If the deed in question is fraudulent, it is not material whether the creditors have any specific lien, for so soon as a judgment is entered it is a specific lien; neither is it material in this case what the circumstances of the father were at the time of making the deed, any further than as an evidence to shew that if he was in indigent circumstances, it was made with an intent to commit a fraud. An essential consideration is whether it is within the proviso of 13 *Eliz.*? for if it is not the court will not require a strict proof of its being fraudulent, and as it is likewise accompanied with a trust, the court will look upon it to be so, and there is no occasion to prove it; for as the defendant must have known his circumstances much better than the plaintiffs it lies on him to prove what his circumstances were at the time. Upon these reasons his Honor declared for the plaintiffs, observing, that though he had a great compassion for a wife and children, yet if creditors should not have their debts their wives and children might be reduced to want. Decreed, the settlement void as against the plaintiffs, and that the trust

(a) *Vide Russell v. Hammond*, 1 Atk. 15. and notes.

Three cases were cited for the plaintiff to make this settlement a fraud, viz. *Osborn and Bradshaw v. Churchman*, Cro. Jac. 127. *Lavender v. Blackstone*, 2 Lev. 146. *Whitbourne v. Jumper*, cor. Jekyll, M. R.

trust estate should be sold for the benefit of the creditors (a).

(a) In *Dunds v. Dutens*, 1 Vef. jun. 196. Lord Thurlow seemed to be of opinion, that the court of Chancery could not touch stock to satisfy creditors. *See* *vide* *Horn v. Horn*, Ambl. 79. *King v. Dupine*, 2 Atk. 603. (n.), and 3 Atk. 192. S. C. *nomine* *King v. Mariffall*.

25 Oct. 1744, cor. Hardw. C.
Brown v. Jones and others,
1 Atk. 190, 191.

46. Though the court will favor creditors as far as they can, yet it must be where they have a superior right.

If a bankrupt has made a settlement without consideration, it is not good; but if a settlement is made before marriage it is good, though without a portion, for marriage itself is a consideration (b), and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if afterwards paid pursuant to the agreement (c).

(b) *Vide* *Ex parte Marsh*, 1 Atk. 158. *Lanoy v. Athol*, 2 Atk. 445.

(c) Such settlements are good, not only against creditors but purchasers. *Vide* *Colville v. Parker*, Cro. Jac. 158. *Jones v. Marsh*, Ca. temp. Talb. 63. *Ward v. Shallet*, 2 Vef. 16. *Hylton v. Biscoe*, 2 Vef. 308. *Wheeler v. Caryl*, Ambl. 121. *Lanoy v. Athol*.

Where creditors have no remedy at law, but must go into equity, the court will make them do equity (d); yet the court will, notwithstanding, aid creditors against defective, fraudulent, or voluntary settlements.

(d) *Vide* *Taylor v. Wheeler*, 2 Vern. 564.

6 Nov. 1745, cor. Hardw. C.
Walker and others v. Burrows,
1 Atk. 93, 94.

47. *B.* in 1718, after marriage, conveyed his real estate to trustees in consideration of 5 s. and other valuable considerations, in trust for himself for life; to his wife for life; then to his eldest son if he survived his father and mother, and so to his next son, &c. *B.* afterwards became bankrupt. *Per curiam*—This is a conveyance which falls directly within the clause of 21 Jac. 1. c. 15. though the statute of 13 Eliz. c. 5. is not sufficient to prevail against it. Decreed therefore, that the trustees do convey to the plaintiffs, the assignees under the commissioners against *B.* It was said that all voluntary settlements are void against creditors, as they are against purchasers under 27 Eliz. c. 4.; but there is always a distinction between the two statutes: it is necessary on the statute of 13 Eliz. to prove that at the making of the settlement the person conveying was indebted at the time or immediately after the execution of the deed, otherwise bad consequences would ensue,

§1. Where favored in Equity, &c.

see, as the statute extends to goods and chattels, and such construction would defeat every provision for children and families, though the father was not indebted at the time (a). Upon the statute of 13 *Eliz.* there is no description of the intent of the conveyance in the enacting clause, but only by reference to the preamble, "*the intent before declared and expressed.*" So that unless the conveyance in 1718 was made for that purpose it will not be void. Now here is no proof that the father was indebted at the time or soon after, so as to collect a fraudulent intention in him, for if he had been indebted at that time, it would have run on so as to take in all subsequent creditors. Where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to equity to make it subject to his debts as real assets, the court has always denied it, unless it could be shewn that he was indebted at the time of the conveyance.

(a) *Vide Russell v. Hammond*, 1 Atk. 15.

But upon the statute of 27 *Eliz.* which relates to purchasers, there a settlement is clearly void if voluntary and not for a valuable consideration, and subsequent purchasers shall prevail to set aside such settlement; but as this can only be applied to the case of subsequent purchasers there is a plain distinction between the two statutes (b).

(b) *Vide Colville v. Parker*, Cro. Jac. 158. *Russell v. Hammond*, 2 Vef. 10, 11. *Evelyn v. Templar*, 2 Bro. Ch. Ca. 148. *et vide Oxley v. Lee*, 1 Atk. 625.

As to the assignees, they stand in the place of the bankrupt, and are bound by all acts fairly done by him.

As to the consideration in the deed of 1718, it is 5 s. and other valuable considerations; that does not oblige the court to hold it to be for a valuable consideration, for it can at most but let the defendant in to prove other valuable considerations.

The trustees must therefore convey to the assignees under the commission, as a case directly within, 1 *Jac.* 1. c. 15. (c).

(c) *Vide Fryar v. Flood*, 1 Bro. Ch. Ca. 160.

48. There were three obligors in a bond: the obligee brought the principal and the representative of one of the sureties before the court, stating by his bill that the third obligor was dead insolvent; wherefore he did not make his representative a party. On the circumstances of this case an objection for want of parties was over-ruled.

4 Feb. 1746, cor. Hardw. C. *Madox v. Jackson*, 3 Atk. 406.

(a) *Vide* Collins v. Griffith,
2 P. Wms. 313.

(b) *Vide* Galton v. Hancock,
2 Atk. 436.

9 Feb. 1746, cor. Hardw. C.
White v. Sansum,
3 Atk. 410. 412.

9 June 1746, cor. Hardw. C.
Edgill v. Haywood and another,
3 Atk. 352—358.

Where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account (a): besides debtors are entitled to a contribution where one pays more than his share.

So if there are different funds, as where the debt is by specialty, and the plaintiff may sue either the heir or executor; both must be made parties (b).

But there are exceptions to these rules; as where some of the obligors are only sureties, there is no pretence for the principal to say a surety should be brought before the court unless he had paid the debt. So where there are no personal assets, and that fact plainly appears in the cause, it is not necessary to bring the representative of the insolvent co-obligor before the court.

49. A trust created by a husband of the wife's estate, will not at law be deemed fraudulent against creditors, nor even against a subsequent purchaser; and equity will not carry it further.

50. *J. D.* was indebted to *C.* by bond in 200*l.* Plaintiff, as administratrix of *C.*, brought an action at law for that sum. *J. D.* pleaded the statute for relief of insolvent debtors (which, it seems, discharged his person but not his future effects). Plaintiff took a judgment for the debt and damages. *J. D.* had a legacy due to him of 1000*l.* under the will of *W. M.* payable in a month after testator's death; but it was not reduced into the possession of *J. D.* Plaintiff issued a *fiery facias*, and took out a warrant to levy her intestate's debt in the hands of the executor of *W. M.* out of the legacy to *J. D.* The executor refused to pay the levy or admit assets. Plaintiff therefore brought her bill to discover assets and enjoin *J. D.* from receiving his legacy. Defendant insisted that this legacy to *J. D.* was a *chose en action* not reduced into his possession. *Per curiam*—The plaintiff, as a judgment creditor, cannot come into equity for a satisfaction out of this legacy. There are few cases where it is necessary for equity to give relief to creditors over personal chattels in possession, because assignments of them to defeat creditors are void and fraudulent at law. But *chores en action* are not liable to executions, because the creditor can, by the ordinary rules of law, compel satisfaction,

faction, seize the person of the debtor, or proceed to an outlawry and take the lands and effects by *capias utlegatum*, which though a proceeding at first *ex gratia* is now the constant practice of the king's courts of revenue, and that is the chief ground on which the court of Chancery has denied a specific remedy. Next as to the insolvent act—It was intended to benefit creditors as to the *subsequent effects*, and to discharge the person of the debtor only. This has been called a privilege, but it is merely a reservation to the creditor of his right, in every respect except that of taking the person of his debtor (and it differs from the case of bankrupts, where the consent of four-fifths of the creditors is necessary to discharge the future effects). As the act therefore is for the benefit of creditors it must be construed beneficially, so as to give them all the benefit intended over the future effects, and as the statute has precluded the creditor from seizing or outlawing the person of his debtor, it could never intend to preclude a remedy against his *choses en action*. It is objected, that the present suit is by one creditor only, and that it ought to have been by all. In all cases of chattels the first person who sues has an advantage by his legal diligence, and of chattels in possession, the first suit has the first satisfaction. The court does not proceed in this case on the ground of a specific lien, but only considers it as a part of the debtor's property, which his creditors cannot come at without the aid of equity. If, therefore, after the judgment, or even after the *feri facias*, the debtor had assigned this legacy *bona fide* for a valuable consideration, and without notice, it would have been good against the plaintiff, his creditor; but after a bill brought, and a *lis pendens* created as to this particular thing, an assignment could not prevail: the court, therefore, ought not to interpose, for the plaintiff has pursued a proper remedy. Decreed, that what shall be found due to the plaintiff for principal, interest, and costs at law or in equity, shall be satisfied out of what is due to *J. D.* on account of his legacy.

51. *R. W.* and his partner gave a bond to *H.* for 1200*l.*, and the same day by deed assigned to *H.* or order the goods in two ships *then at sea*, and also thirteen bills of lading, and policies of insurance containing the said goods as a collateral security

22 Oct. 1746, cor. Hardw. C.
Brown, Assignee, v. Heatbottle and another,
1 Ark. 160, 1, 2.

security; the latter indorsed to *H.*, the former not. Bill by the assignees of *R. W.*, who had become a bankrupt, for these goods, insisting that *R. W.* acted as the visible owner of the ship and cargo, the same being not put into the possession of *H.*, and therefore that the plaintiffs were entitled thereto for the benefit of the creditors at large. *Per curiam*—Every thing which could shew a right to the ship and cargo being delivered over to *H.*, *R. W.* could no longer be said to have the order and disposition of them; and therefore this case is not within the meaning of 21 Jac. 1. c. 19., consequently *H.* has a right to retain the ship and cargo till the principal sum of 1200 *l.* and interest is satisfied (*a*).

(*a*) So. Ex parte Matthews, 2 Vef. 272. Atkinson v. Malings, 2 Term Rep. B. R. 462. Lempriere v. Pasley, 1b. 485. Ex parte Batson, 3 Bro. Ch. Ca. 362. Secus, if the creditor suffer the ship to come back and go upon another voyage, 2 Vef. 272. Hall v. Gurney, 1 Cooke, B. L. 380. Vide Ex parte Stadgroom, 1 Vef. jun. 163.

Vide Stevens v. Sole, 1 Vef. 252. 1 Atk. 157. cited, et vide Bourne v. Dodson, 1 Atk. 154. Ryal v. Rolle, 1 Atk. 165.

Vide Jacobs v. Shephard, cited 2 P. Wms. 431. and stated fully by Lord Mansfield, 1 Burr. 478.

Vide Taylor v. Wheeler, 2 Vern. 464. S. P.

Vide Cock v. Goodfellow, 1 P. Wms. 430. 10 Mod. 489. 1 Burr. 478.

4 May 1747, cor. Hardw. C.
Blount v. Doughty,
Blount v. Blount,
3 Atk. 481.

Vide Thynn v. Thynn, 1 Vern. 296. 1 Eq. Abr. 380.

Vide Bell v. Scott, 2 Lev. 70. Newstead v. Searle, 1 Atk. 265. Stiles v. Attorney-General, 152. or Bedford v. Gibson, 9 Mod. 412. which appears to be S. C.

A. being indebted to *B.* assigned over barges to *B.*, who suffered *A.* to keep the possession. This is a fraud upon the creditors at large; and the barges may be seized under a commission of bankruptcy taken out afterwards against *A.*

Where there is an assignment of an outward bound cargo, it is a complete contract, though the cargo is not delivered to the assignee.

Indorsing a bill of sale does not amount to an assignment, unless the goods are directed to be delivered to the assignee.

Assignees of a bankrupt take, subject to all equitable liens against the bankrupt himself.

Assignments of *choses en action* for a valuable consideration are good against creditors under a commission of bankruptcy.

52. The court will not determine bonds to be voluntary if they do not exactly tally with the sum given for them; but if the contract was fairly entered into, without circumstances of fraud, it has been held to be made for a valuable consideration.

Where a son taking beneficially under a father's will promises to make it good, this may be a valuable consideration for a bond, and it will not be fraudulent.

Where the court sees a consideration is made up with a view to defraud creditors they will reduce it to what is just and equitable.

53. A person may as well make a disposition by deed to take place after death (a) as by will; and such a deed has been decreed to be good in several instances, as against persons standing in representation to the donor; but otherwise as against creditors.

28 July 1747, cor. Hardw. C.
Drakeford v. Wilks and another,
3 Atk. 540.
(a) *Vide Ramden v. Jackson*,
1 Atk. 292.

54. A. made B. executor and residuary legatee, and by deed of the same date vested 4000*l.* in him to pay an annuity to A. for life, and afterwards 1000*l.* a-piece to C. and D., and an annuity to E., if they survived him. This is a voluntary and testamentary act, and void against the general creditors within the 13 *Eliz.*

28 Oct. 1748, cor. Hardw. C.
Peacock v. Monk, 1 Ves. 127.

55. A debtor being in custody under a *ca. sa.* the sheriff during the continuance of it seizes a leasehold estate for 99 years under a *fi. fa.*, but makes no sale of it till after the return of the writ. He then sells without a continuance of the execution or any *venditioni exponas* (a). The vendee assigns this estate in trust for the sons of the debtor, who join with the trustee in an assignment to one Cole. The sale by the sheriff is good; but an inquiry into the fairness of the transaction was recommended.

4 Feb. 1747, cor. Hardw. C.
Jeames v. Wilkins, 1 Ves. 295.
Lord Chancellor admitted that during the existence of a *ca. sa.* and the debtor in custody a *fi. fa.* ought not to be taken out, although, if defendant dies, plaintiff may have a new execution, as upon the statute of 21 Jac. 1. yet while that continues resort cannot be had to any other execution, and the court, without putting the party to his *audita querela*, would set it aside on motion. But yet that *fi. fa.* was

not void, and the sheriff may justify taking the leasehold by that writ.

(a) A *venditioni exponas* is not a writ of necessity, *vide Ayr v. Aden*, Cro. Jac. 73.

The sheriff under a *fi. fa.* has a special property, and the goods are bound from the delivery of the writ in the case of a common person, though in the case of the crown it remains as at common law.

Vide Wilbraham v. Saw,
1 Lev. 282.

56. Lord Chancellor in this cause said, there is no case where a person indebted makes a conveyance of a real or chattel interest for the benefit of a child, without the consideration of marriage or other valuable consideration, and dying indebted afterwards, that it shall take place. There is a difference between the statutes of 13 *Eliz.* in favor of creditors and 27 *Eliz.* in favor of purchasers. But that difference by way of general rule was never suffered to go further than that on the 27 *Eliz.* every voluntary conveyance made, where afterwards there is a subsequent conveyance for a valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are, that such mere voluntary conveyance is void at law by the subsequent

13 July 1750, cor. Hardw. C.
Lord Townsend v. Windham,
2 Ves. 10, 11.

quent purchase for a valuable consideration. And on the 13 *Eliz.*, if there is a voluntary conveyance of a real estate or chattel interest by one *not indebted at the time*, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud *subsequent* creditors, that will be good; but if any such fraud appears that will make it void. Lord Chancellor said there was no case on the 13 *Eliz.* where a man *indebted* makes a voluntary conveyance to a child without consideration, *and dies indebted*; but that it shall be considered as part of his estate for the benefit of his creditors.

2 Aug. 1750, cor. Hardw. C.
Attorney-General v. Wborewood,
Wborewood v. Univ. Coll. Oxon,
1 *Ves.* 539.

57. A voluntary agreement by a husband is good against his executors, though not against his creditors.

6 Nov. 1750, cor. Hardw. C.
Bonnet v. Masgrave, 2 *Ves.* 51.

58. A bill lies for a creditor by elegit to set aside a fraudulent conveyance, whether he could recover at law or not.

Dec. 1750, cor. Hardw. C.
Ex parte Wildman, 1 *Ash.* 110.
2 *Ves.* 115.

Vide Ex parte Lesfibre, 2 *P. Wms.* 407. *Ex parte Ryfwick*,
3 *P. Wms.* 89.

59. An obligee may have several actions against each obligor, but shall not levy more than one satisfaction for his debt.

A creditor is entitled to come under a commission of bankrupt against all the obligors, drawers of notes, &c. till he is completely satisfied.

26 Oct. 1751, cor. Hardw. C.
Wheeler v. Caryl, *Ambl.* 121.

60. A daughter entitled to 6000*l.* secured on land by her mother's marriage settlement, subject to a contingency, married clandestinely in the lifetime of her father. Afterwards the father secured the 6000*l.* on his estate to the husband, and he made a settlement on his wife; held good, and not a fraudulent conveyance against the creditors of the husband.

14 Nov. 1763, cor. Henley, C.
Coylgarne v. Jones,
Ambl. 613.

Vide Newbury v. Wren,
1 *Vern.* 221.

61. A bill was brought by creditors in the court of Exchequer, upon which a decree was made. Other creditors brought a bill in Chancery for the same purpose, and the court decreed the account, &c. saying the decree in the Exchequer was not complete.

T. 1781, cor. Thurlow, C.
Hosfell and another, Assignees, v. Symson, 1 *Bro. Ch. Ca.* 99.
Vide Doug. 89. 1 *Cooke's Bankrupt Laws*, 110, 111. *Kettle & al. Assignees v. Hammond*, *H.* 1767, accord.

(a) The deed itself created an insolvency in the trader; for af-

62. A conveyance of *all* (a) a trader's goods (he being solvent at the time, and continuing in trade three years after) held by Lord Chancellor not an act of bankruptcy, and a new trial ordered, the jury on the first having found him a bankrupt. On the new trial, and a case reserved and argued

§ 1. *Where favored in Equity, &c.*

in B. R., it was determined to be an act of bankruptcy.

—*Vide Law*

ter having assigned over all, he can have nothing to trade with.
v. Skinner, 2 Blackst. Rep. 996.

63. Under the forfeiting acts in *America* the estates of the loyalists were directed to be sold for payment of debts. Defendant, instead of resorting to the confiscated fund, brought an action in B. R. against the plaintiff on his bond. Upon a bill for an injunction *Lord Chancellor* said, It is impossible to relieve the plaintiff against the defendant's acknowledged right to sue. It does not appear that defendant had made himself a party to the confiscation of this property, or that under that commission he had property in his hands applicable to the payment of his demand, and yet had maliciously sued the plaintiff. As it cannot be argued that defendant has a right in any particular fund, it would not be consonant with natural justice to prevent him from suing upon a contract in its nature transitory. The motion for an injunction stood over, and afterwards the money was paid.

M. 1785, cor. Thurlow, C.
Kempe v. Antill,
2 Bro. Ch. Ca. 11.

64. A judgment having been obtained at law, though for an usurious debt, the creditor must stand as a judgment creditor for the money actually advanced, and legal interest.

T. 1789, cor. Thurlow, C.
Scott v. Nesbitt,
2 Bro. Ch. Ca. 641.

65. A creditor having it in his power to obtain warrants for payment of an *American* loyalist's debt out of his estate there, is bound, upon being referred to that property by the debtor, to make it available as far as he can: but where the creditor is not informed of that property, no laches can be imputed to him; he therefore shall not be restrained by injunction from prosecuting his suit here, although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.

H. 1790, cor. Thurlow, C.
Peters v. Ewing & al.
3 Bro. Ch. Ca. 54.
Vide Wright v. Nutt, 3 Bro.
Ch. Ca. 326. *Kemp v. Antill*,
2 Bro. Ch. Ca. 11. *Holditch v.*
Mist, 1 P. Wms. 695.

66. A creditor of a wife has a right in equity against her separate property, and against her husband in respect of it, but not beyond it, if the creditor has notice of such separate property. Plaintiff, with notice of a separate allowance of the wife (a very weak woman) advanced to her wantonly beyond it. Upon proof that the plaintiff had received more than the demand she could make out, bill dismissed without account or costs, the value being trifling and the plaintiff miserably poor.

5 Mar. 1791, cor. Thurlow, C.
Lillis v. Airey, 1 Ves. jun. 277.

3 Aug. 1791, cor. Thurlow, C.
Wright v. Nutt and another,
 3 Bro. Ch. Ca. 326.

27 Feb. 1793, cor. Loughb. C.
Pringle v. Hodgson,
 3 Ves. jun. 617.

All the cases on this subject
 were reviewed by Lord Lough-
 borough.

Vide Worall v. Marlar, in Mr.
 Coxe's note to Bosvil v. Brander,
 1 P. Wms. 459.

As to a particular assignment
 by the husband for a valuable
 consideration, *vide* Like v. Be-
 resford, 3 Ves. jun. 506. *Vide*
 also Burdon v. Dean, 2 Ves. jun.

607. *Oswell v. Probert*, 2 Ves. jun. 680. *Brown v. Clarke*, 3 Ves. jun. 166. *Freeman v. Partley*,
 3 Ves. jun. 421. *Pryor v. Hill*, 4 Bro. Ch. Ca. 139. *Vide* Note to *Jewson v. Moulson*, f. 9. tit. Baron
 and Feme, vol. 1. of this Work.

67. The plaintiff's testator's property in *America*
 being confiscated, *subject to his debts*; a creditor
 there ought first to apply and make that property
 available, as far as possible, to the payment of his
 debt, before he sues him personally here.

68. A settlement was made (after marriage, of
 stock,) standing in the name of the wife before,
 and at the time of the marriage, as her fortune.
 The husband being insolvent at the time, and soon
 after becoming a bankrupt; the same was set aside
 as fraudulent against creditors, upon a bill brought
 by the assignees after the death of the husband.
 The stock did not survive; but was decreed to the
 assignees, subject to a provision out of it to the
 widow.

Of Voluntary Deeds; of Deeds obtained by
 fraud, compulsion, duress, or misrepresenta-
 tion; of Deeds lost, concealed, or destroyed;
see ante, tit. *Agreement, Bond, et post*. tit. *Deeds*,
Fraud, Heir, Catching Bargains.

Of Settlements made either before or after the
 marriage of a debtor, where good against cre-
 ditors, and where voluntary and fraudulent;
see post. tit. *Deeds, Marriage*.

Of Debts due on Bond, Judgment, Statute, or
 Recognizance; v. *Bond, Elegit, Extent, Se-
 curities*.

Of Debts due to the crown; v. *Extent, Revenue*.

Of the Debts of a feme covert; v. *Baron and
 Feme*.

Of Creditors and the proof of their debts under
 a commission of bankruptcy, v. *Bankrupt*.

Of the Limitation of Debts, v. *Limitation, Pre-
 sumption, Time*.

Of the Cases wherein a creditor has two or
 more remedies against his debtor; where he
 shall be put to his election and where not,
 v. *Bankrupt, Election*.

In what cases Copyhold Estates are liable to
 debts, v. *Copyhold*.

SEC. 2. Of Deeds of Trust for Payment of Debts—what Debts shall come within the Provision of such Deeds, and of the Precedence which one Debt shall have over another in Equity.

1. *A.* was indebted in 1500 *l.*, whereof 500 *l.* was secured by mortgage, and the residue by bond: *A.*, before his death, made a lease of all his lands to trustees for payment of his debts, which lease in the whole was worth about 1200 *l.* *A.*'s heir, after his death, sells as much land as pays 1400 *l.* (which was more than the value of the trust estate) whereof the mortgage was part. *P.*, who was a creditor for 100 *l.*, (remainder of the 1500 *l.*) brought his bill against the heir and trustees to have his debt satisfied out of the trust estate. It was insisted for the heir, that having paid as far as the value of the trust estate did extend, he ought not to have his land charged any further. But it was ruled by Lord Chancellor, that since the trust lands were not sufficient to satisfy the whole debts, the heir and the trustees and the mortgagee should not juggle together to cheat other creditors by paying the mortgage first off; but, on the contrary, the trust lands should be applied, in the first place, for the other debts, because the mortgagee could be at no damage, being secured by this mortgage; but, on the contrary, if the mortgagee should be first satisfied, the other creditors might lose their debts; and so the plaintiff, in this case, had relief for his debt.

P. 1680, cor. Finch, C.
Povey's case, 2 Freem. 51.
2 Eq. Abr. 256. pl. 1.

2. *J. S.* made a deed of trust for payment of his debts to take effect after his death. The words in the deed were *monies owing by him*, and a schedule was annexed mentioning a debt of 1000 *l.* to *A.*, 500 *l.* to *B.*, and 3000 *l.* to other persons. Decreed, that the lands of *J. S.* should stand charged only with such debts as were due at the time of executing the deed, and not with any debts contracted afterwards, though such debts might come within the amount mentioned in the schedule.

H. 1681, cor. Nottingham, C.
Purefoy v. Purefoy,
1 Vern. 28.
1 Eq. Abr. 138. pl. 1.

3. Upon a special report the sole question was, How a duty decreed should take place in relation to

H. 1682, cor. North, C. S.
Harding v. Edge, 1 Vern. 143.
1 Eq. Abr. 144. pl. 22.

A decree is equal to a judgment at law, *vide* Bishop v. Godfrey, Prec. in Ch. 179. Morrice v. Bank of England, Ca. temp. Talb. 217. 3 P. Wms. 402.

to other debts in point of priority of satisfaction? Ordered, that a decree should precede debts on simple contract, and bonds, and take place next to judgments; and a case was cited where it had been so resolved: and as to an objection made in this case, that in debt upon a bond at law an executor could not defend himself by pleading he had no assets *ultra* what would amount to satisfy the decree; it was answered, he might defend himself by a bill in equity which would take care to protect him.

23 Nov. 1682, cor. Nottingh. C.
Anon. 1 Vern. 104.
2 Vent. 357.
Vide Heycock v. Heycock,
1 Vern. 256.

4. Where a man devises lands for payment of debts and legacies out of the rents and profits thereof, there the trustees, being in the case of a will, may sell the lands; but if it be to pay debts and legacies out of the *annual* rents and profits, the lands shall not be sold though in case of a will. Such words in a deed executed in a man's lifetime, however, shall in neither case empower the trustees to sell.

M. 1682, cor. Nottingham, C.
Child v. Stephens, 1 Vern. 101.
1 Eq. Abr. 142. pl. 4.

5. A man indebted by several mortgages, judgments, and bonds, and in other debts by simple contract, settled his estate for payment of his debts. The real securities shall be first paid, and then the bonds and simple contracts in an average (a).

(a) An executor shall discharge a subsequent judgment before a prior statute, because of the notoriety of it, 4 Co. 59. but if the statute be extended, whether the judgment creditor may enter on the conveyance, *quære*; *et vide* 2 Andr. 157. Cro. Eliz. 734. 822.

H. 1684, cor. North, C. S.
Spalding v. Shalmer & al.
1 Vern. 301.

6. Where lands are conveyed to trustees to be sold for the payment of particular debts, as mentioned in a schedule, a purchaser must take care to see his purchase-money rightly applied, or he will be affected by the breach of such a trust.

But if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account, and the trustees cannot sell just so much

(a) *Vide* Culpepper v. Aston, 3 Ch. Rep. 115. cited in Walley v. Whalley, 1 Vern. 487. where it was settled that if trustees are appointed to sell lands for the payment of debts, a sale by them of more than is sufficient is not good.

M. 1684, cor. North, C. S.
Dunch v. Kent & al.
1 Vern. 260.
1 Eq. Abr. 147. pl. 12.

7. A deed of trust was made for payment of all such debts as should come in within a year. A creditor will not be excluded, though he doth not come in till after the year; but a bill may be exhibited after the end of the year to compel the creditors

§ 2. *Trusts by Deed for Payment of Debts.*

creditors who stand out to come in, or renounce the benefit of the trust.

Where a deed of trust is for payment of debts in general, a purchaser is not affected with any misapplication of the money. *Secus* where it is for payment of debts particularly specified.

8. If there is a debt owing to the king equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets.

2 May 1687, cor. Jeffries, C.
Sagitary v. Hyde, 1 Vern. 455.
1 Eq. Abr. 142. pl. 3.

9. A decree in equity for a sum certain is equal to a judgment at law, and shall be paid *pari passu*, therewith; but if the decree be only for an account, it is only equal to a judgment *quod computet*, till the account be stated.

M. 1688, Canc.
Searle v. Lane, 2 Freem. 104.
1 Eq. Abr. 144. pl. 23.

10. If a freeman of *London* gives a voluntary judgment, payable three months after his death, it shall be postponed to debts by simple contract, and to the widow's customary part; but will bind the freeman's legatory part(a).

27 Jan. 1690, cor. Lds. Comrs.
Fairbeard v. Bowers,
2 Vern. 202.
1 Eq. Abr. 143. pl. 15.
Prec. in Cb. 17.

(a) Lord Commissioner Rawlinson said he thought the judgment should be paid before legacies, if there were any.

11. A recognizance being enrolled by the special order of the court after the time for enrolling it was elapsed, the consur between the date of the recognizance and the enrolling it, borrowed money of *J. S.* upon a judgment, which was now overreached by the recognizance, and the estate of the consur was in mortgage prior to the recognizance; so that neither the recognizance nor the judgment could reach the estate without the aid of equity:—The court inclined to give the preference to the judgment creditor.

23 July 1691, cor. Lds. Comrs.
Fothergill v. Kendrick,
2 Vern. 234.
1 Eq. Abr. 144. pl. 20.

12. Debts on bond and debts ascertained are to be preferred in payment to debts which only found in damages.

27 June 1692, cor. Lds. Comrs.
*Whiteburch & al. v. Lord Bayn-
ton & al.* 2 Vern. 272.
1 Eq. Abr. 144. pl. 20.

13. By an extent in aid taken out by a simple contract creditor against himself, and the debt found, he preferred himself to bond creditors, who had recovered judgment against the executor. Upon a bill by the executor for relief, defendant pleaded the proceedings in the Exchequer in bar, and by his answer confessed he was able to pay the

T. 1692, Canc.
Dickenson v. Molineux,
Prec. in Cb. 47, 48.
Vide 17 Vin. Abr. tit. *Prærog.*
529, 530, 531.

(a) *Vide contra*, *Brown v. Trant or Bradshaw*, 2 Vern. 426. Prec. in Ch. 153. *Cholmley v. Sturt* there cited.

Capel v. Brewer, 2 Vern. 469.

M. 1699, Canc.
Lewkner v. Freeman,
Prec. in Ch. 105. 2 Freem. 236.
1 Eq. Abr. 149. pl. 5.

king at the time of the extent. The court allowed the plea, and would not relieve the plaintiff (a).

14. *A.* brought an action against *B.* for lying with his wife, after which *B.* assigned his estate to trustees in trust to pay the several debts mentioned in the schedule, and such other debts as he should name, within ten days. *A.* recovered 5000 *l.* damages, and then brought his bill to set aside the deed as fraudulent, and made to defeat him of his verdict. *Per curiam*.—This deed is not fraudulent either at law or in equity. The plaintiff was no creditor at the making of the deed, and this debt since recovered being founded in *maleficio*, it was conscientious to prefer the others, who were real creditors. But it was held that the plaintiff should have an interest in the surplus, after payment of the debts provided for by the deed.

P. 1701, cor. Wright, C. S.
Brown and another v. Trant & al.
2 Vern. 426.

Reported Prec. in Ch. 153. as
Brown v. Bradshaw & al.

Vide Vin. Abr. tit. Praerog.
529.

15. Assignees under a commission of bankruptcy brought their bill for an account against some persons who had seized the bankrupt's estate by virtue of three extents, the one for the king, the other two were extents in aid. Bill dismissed, the matter being properly cognizable in the court of Exchequer, which is the king's court of revenue.

But it was otherwise where the defendant, who had sued out an extent in aid, confessed by answer that he has sufficient estates of his own to pay the king's debt (a).

(a) *Vide Capel v. Brewer*,
2 Vern. 469.

Or where it appears to be a fraudulent contrivance by an extent in aid to gain a preference to a debt of an inferior nature (b).

(b) *Cholmley v. Sturt*, cited
2 Vern. 426.

Vide contra, *Dickinson v. Molineux*, Prec. in Ch. 47, 48.

T. 1703, cor. M. R.
Walter v. Saunders,
1 Eq. Abr. 58. pl. 5.

16. A settlement was made by *A.*, whereby he created a term for years, in trust, to raise 400 *l.* a-piece for his two daughters; one of them married *B.*, and *B.* and his wife brought a bill, and had a decree to have the 400 *l.* raised and paid, but before it was raised *B.* assigned the benefit of this decree to *J. S.* in trust for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided for. The creditors brought a bill to have the benefit of this assignment. *Per cur.*—This was a term for years and not a sum of money, and not to be distinguished from

from Sir Edward Turner's case (a); therefore the court must decree it, that there may be a uniformity of judgments.

See: If the term was assigned in trust for the wife with the privity of the husband, in Pitt v. Hunt, (1 Vern. 18.) expressed great surprise.

(a) Sir Edward Turner's case (1 Vern. 7.) was this, a feme possessed of a term married. Decreed that the husband might dispossess of the privity of the husband. At this resolution, however, Lord Nottingham, in Pitt v. Hunt, (1 Vern. 18.) expressed great surprise.

17. If a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt due on simple contract, and the statute of limitations will run upon it.—The statute of limitations provides where the party to whom a debt is owing goes beyond sea; but not where the debtor is beyond the seas.

H. 1705, cor. Cowper, C. S.
Duplein v. De Rouen,
2 Vern. 540.
1 Eq. Abr. 144. pl. 17.

18. It was decreed in this case at the Rolls, that mortgages were to be paid in the first place, and then judgments, and then recognizances, &c. But upon an appeal to the House of Lords, it was adjudged, that mortgages were not to be preferred to other real incumbrances, but that mortgages, judgments, statutes, and recognizances should take place according to their priority, and as they stood in order of time.

M. 1705, cor. Cowper, C. S.
Earle of Bristol & al. v. Hungerford,
2 Vern. 534.
1 Eq. Abr. 142. pl. 5.

19. A *chose en action* is assignable in equity upon a consideration paid. A seaman assigns his wages as a security for money, and dies indebted. This assignment specifically binds the wages, and the money secured thereby shall be paid in preference to all other debts.

M. 1707, Canc.
Creuch v. Martin, 2 Vern. 595.

20. An incumbrance by judgment being a lien on the land, if made prior to the grant of an annuity, shall be preferred before the grant of an annuity, because his charge on the land is posterior.

P. 1708, cor. Cowper, C.
Davison v. Goddard,
Gilb. Eq. Rep. 66.
2 Eq. Abr. 256. pl. 3.

21. A creditor who obtains judgment after the debtor has made a conveyance of his estate for payment of his debts, shall be paid only in average.

H. 1710, cor. Harcourt, C.
Stephenson v. Hayward,
Prec. in Ch. 310.
Vide Prec. in Ch. 190. 2 Vern.
435. 1 Eq. Abr. 142. pl. 6.
10 Mod. 426. 16 Vin. tit. Payment, 282. pl. 6. 9.

22. One of several partners, who was treasurer for the whole, entered into a contract with A., and afterwards failing, his estate was vested in trustees. Though the contract with A. concerned the partnership business, yet he was not entitled to any satisfaction out of the treasurer's share of the partnership effects, but must come in equally with the rest of his creditors, the money due to A. upon the contract not being for wages.

11 May 1713, Dom. Proc.
Ball v. Lord Langshorough & al.
1 Bro. P. C. 384.
See a former part of this case,
1 Bro. P. C. 256. nomine Ball
v. Coggs & al. et vide S. C. more
fully stated, post. tit. Trade.

23. A

M. 1713, cor. Harcourt, C.
Thomas v. Terry,
 1 *Eq. Abr.* 139. pl. 5.
Gillb. Eq. Rep. 120.

23. A man borrows a sum of money on the mortgage of a ship, and covenants that whatever money the mortgagee should advance for insurance of the ship in a voyage she was then about to make, he would repay; but there was no covenant for the repayment of the principal money itself. The mortgagee insures the ship, and the mortgagor repaid him that money; then the ship proceeds on her voyage, and returns home; and being afterwards to go out on another voyage, the mortgagee treated with a person concerning the insurance, but could not agree for the rate, and thereupon the ship went out and was lost on the voyage: and now between the mortgagee and the executors of the mortgagor the question was, Whether the mortgagee should come in for his principal money as a creditor by simple contract? It was argued that he ought not, because there was no covenant for payment of the mortgage money, so that he must be supposed to rest himself on the ship only for his security; and that being lost, so was his money too: but on the other side it was urged, that if he had taken no security at all for his money, he had then without doubt been a creditor by simple contract; and surely the taking security ought not to put him in a worse condition, especially now that the security being lost and gone, his debt rested wholly on the simple contract: and the court being of the same opinion, it was decreed so accordingly.

H. 1720, cor. Parker, C.
Lowther v. Fletcher & al.
 7 *Vin.* 53. pl. 4.
 2 *Eq. Abr.* 151. pl. 5.
 3 *P. Wms* 46 (n.)

Mr. Viner says, another point was started, viz. that one of the judgment creditors had sued out a ca. sa. and taken defendant F. in execution; to which he says, quære, if this creditor should be let in, in a court of equity, to have a satisfaction out of the money raised by sale, unless he discharged the execution at law, and delivered defendant out of custody; for by the ca. sa. this creditor had concluded himself from taking out any other execution so long as defendant lived: but if defendant died in prison, after his death the creditor might sue out an elegit or fi. fa.; but

24. A bill was brought for a sale of defendant F.'s estate to satisfy his creditors by mortgages and judgments. C. a papist professed, had a mortgage for 2000 *l.* upon the estate prior to plaintiff's mortgage, and he had also a judgment subsequent to plaintiff's mortgage, and to several other judgments, and to other creditors. The question was among the creditors, Who should have the priority in payment, the estate not being sufficient to pay off all the mortgages and judgments? *Per* Lord Chancellor—The mortgage to C. being a papist professed, is void by the statute 11 & 12 *W.* 3. for that is an interest in land; but as to the judgment, though a papist cannot take out an *elegit*, for that gives him an interest in the moiety of the debtor's lands: yet if lands are decreed to be sold for payment of debts, equity ought to assist the fair

§ 2. *Trusts by Deed for Payment of Debts.*

D—e 459

fair creditor (though a papist professed) in obtaining a satisfaction for his debt: and when the land is sold and turned into money, why should not he be paid his debts out of that money, as well as another person? Ordered, all the lands to be sold, and an account stated of the debts, and their priority; and if there was sufficient to pay all the creditors, then the money to be so applied; but if there should be a deficiency, then upon the Master's report, the court is to determine as to the preference of the creditors.

so long as his body remained in execution, no other execution could be sued out against him.

25. *A.* being indebted to *B.* in 800*l.* on a stated account, entered into articles for the payment of this debt by instalments, of 80*l.* per annum. *A.* afterwards by deed, created a term of years for the payment of his debts out of the rents and profits of his estate, but not by sale or mortgage. Only two of these instalments being paid, a bill was brought for recovering the rest; and on a question whether they carried interest, it was held they did, and they were accordingly decreed to be paid, with interest at 4 per cent.

5 Feb. 1734, Dom. Proc.
Countess of Kildare and another v.
Hopson Esq. Administrator,
4 Bro. P. C. 164.

26. A voluntary bond in equity shall be postponed to debts on simple contracts; and if claimed for money lent, and the person fails in proving his consideration, it cannot be set up afterwards as a voluntary bond.

1 Feb. 1737, cor. Hardw. C.
Ramsden v. Jackson, 1 Atk. 294.
Vide Faubear v. Bowers,
2 Vern. ac2. Prec. in Ch. 17.
Cray v. Rooke, Ca. temp. Talb.
153. *Blount v. Doughty,* 3 Atk.
483. *Jones v. Powell,* 1 Atk. 84.

27. Where companies are obliged to make calls, equity will not decree them to make such a call in favor of a particular creditor.

24 Oct. 1740, cor. Hardw. C.
Case of York Buildings Company,
2 Atk. 56.

28. The late Duke of *W.* granted two annuities to *Dr. Y.*, chargeable on his lands. The first in 1719 was in consideration of the great progress and advances which the Doctor had made in polite learning; and the second in 1721 (after vesting his estates in trustees by sale, &c. to pay all his debts) was in consideration that the Doctor at the request of the Duke had quitted the service of Lord *E.*, and had thereby lost an annuity of 100*l.* The latter annuity recited the former grant, and each had a power of distress. In 1725 the Duke made a second general deed of trust of the surplus in the hands of the first trustees, in order to pay all his just debts. The question was, Whether these annuities, or either of them, should prevail against bona fide bond or simple contract creditors? *Per*

M. 1741, cor. Hardw. C.
Bedford v. Gibson, 9 Mod. 412.
2 Atk. 152.
nam. Stiles v. Attorney-General;
but the reporters differ in the period
of adjudication.

The case of *Jones v. Powell,*
1 Eq. Abr. 84. 103 was cited,
but Lord H. thought it not ap-
plicable.

cur.

cur.—The two grants fall under different considerations: the first is for a very honourable consideration, but not such a one as the statute of *Elizabeth* ever intended: *aliter*, if the Doctor had been the Duke's tutor. As to the second, there appears a sufficient consideration to support it against creditors under the statute of *Elizabeth*. So far as the annuities are voluntary, they are good against the grantor himself, though otherwise perhaps upon the administration of legal assets in the hands of an executor or administrator; for there a voluntary bond shall be postponed to simple contract creditors for a valuable consideration: these annuities are charges upon a fee-simple estate. Decreed therefore, that the first annuity shall not prevail against either bond or simple contract creditors for valuable consideration; but the latter shall take place of both: and that the former shall be paid out of the surplus, if any, in the hands of the Duke's representatives.

26 Mar. 1746, cor. Hardw. C.
Deacon v. Smith & al.
3 Atk. 327.

29. It is in the power of the owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien upon the lands.

5 May 1746, cor. Hardw. C.
Reynish v. Martin, 3 Atk. 333.

30. Bond creditors are considered in equity as having a priority to simple contracts, because they have a priority at common law, and the court of Chancery governs itself by the rules established in that *forum* to whom the jurisdiction properly belongs.

21 Mar. 1747, cor. Hardw. C.
Godfrey v. Watson, 3 Atk. 517.

31. Where a creditor by judgment extends lands by *elegit*, he holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot on a writ *ad computandum* insist on the creditor's doing more than account for the extended value; but if the debtor comes into equity for relief, the court will give it him, by obliging the creditor to account for the whole he has received; yet as he who comes for equity must do equity, the court will direct the debtor to pay interest to the creditor, though it should exceed the principal (a).

(a) *Vide Bromley v. Goodere*,
1 Atk. 80. n. 2.

A creditor by mortgage who has tacked a judgment to his mortgage, is not confined to the extent of the penalty upon the judgment, but may carry the computation of interest beyond the penalty of the judgment.

Vide more post. tit. Mortgage.

§2. Trusts by Deed for Payment of Debts.

D—e 461

32. A judgment creditor leaving in the hands of his debtor goods, which he has taken in execution, cannot come against such goods, and insist on a right as a prior judgment creditor,

16 May 1750, cor. Hardw. C.
West v. Ship, 1 Ves. 456.

33. One seised of an estate in fee, subject to several equitable incumbrances, sold it, and conveyed the legal estate to the purchaser, covenanting against all incumbrances except some few of the equitable ones, which he specified; those not excepted were prior in date. The purchaser had no notice of any of the incumbrances but those which were specified. *Lord Chancellor*—It is desirable to put all the creditors upon a level, if it can be done, as in the case of equitable assets; but the great point is, on the effect of notice. *Lord Chancellor* deferred his opinion until the registry of *Greswold v. Marsham*, 2 Ch. Ca. 170. could be searched. Afterwards his lordship declared, that the purchaser should be considered as a trustee for the excepted creditors only, who by reason of the notice were to be preferred. His lordship wished to divide the money equally between all the creditors, but he could not do it by the rules of the court.

17 Nov. 1752, cor. Hardw. C.
Ingram v. Palbam,
Amb. 153, 154.

34. A rector entitled to an annuity stipend in lieu of tithes, to be collected by a pound rate, assigned it by way of mortgage; afterwards a creditor of the rector got judgment, and in the regular course a sequestration of the stipend. Held the mortgagee should be preferred to the sequestration creditor, who was directed to account to him for the stipend, from the time he had notice of the mortgage.

21 July 1757, cor. Clarke, M.R.
Errington v. Doctor Howard and others, *Amb.* 485.

35. Priority of satisfaction amongst equitable securities must be according to the priority of their dates.

H. 1784, cor. Thurlow, C.
Beckett v. Cordley,
1 Bro. Ch. Ca. 353.

See this case at large, post. tit. Mortgage.

36. A creditor having five bonds, one of which had been paid before the bill was filed. Afterwards it was decreed that the specialty creditors should abate in proportion:—He shall not be called upon to bring back what he had received, but shall abate on the outstanding debt only.

H. 1703, cor. Lds. Comrs.
Lothian v. Hasel,
4 Bro. Ch. Ca. 167.

37. A mortgagee had also a bond, on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption in trust for his creditors,

H. 1795, Scacc.
Lloyd v. Huchitt, 2 Anst. 525.
Vide Tew v. Lord Winterton,
3 Bro. Ch. Ca. 492. *Coleman v. Winch*, 1 P. Wms. 776. Mor-

rett v. Parke, 2 Atk. 53. Archer v. Snatt, Stra. 1107.

Vide Ketilby v. Ketilby, cor. Bathurst, C.

creditors, paying this bond first: nothing beyond the penalty can be claimed.

A devise for payment of debts revives simple contract debts, even of 70 years standing, with full interest; but bond creditors can claim nothing beyond the penalty.

Of Marshalling Assets and the Order and Priority in which the Debts of a deceased Debtor shall be paid by his Representatives; see *post*. tit. *Executor and Administrator*.

Of the Devise of Lands by a Debtor; where chargeable with Debts and in what Manner; see *post*. tit. *Devise, Trust*.

Where the personal Estate shall be applied to the Discharge of Debts in Exoneration of the real *et c contra*; see Matters controverted between Heir and Executor, *sub* tit. *Executors and Administrators*.

Of Trusts for raising Portions and Payment of Debts; see *post*. tit. *Portions and Trust*.

SEC. 3. Of the Composition of Debts by Deed of Trust or Letter of Licence; and herein of private and underhand Engagements or partial Payments in Fraud of such Deeds.

M. 1683, cor. North, C. S. Sewell v. Muffon, 1 Vern. 210. 1 Eq. Abr. 28. pl. 3. 147. pl. 11.

1. A Creditor agreed to take less than his debt, so as the money was paid on a day certain; the money not being paid at the day, he sued for the whole. Lord Keeper would not relieve the debtor for *cujus est dare ejus est disponere*; and where a creditor has agreed to accept a lesser sum in satisfaction of a greater, such agreement ought to be precisely performed.

T. 1683, cor. Jeffries, C. Child v. Danbridge, 2 Vern. 71.

2. A tradesman failing, compounded with his creditors; but some of them refusing to come in, he made an underhand agreement with them to pay them the whole. This is a fraud on the rest; and on a bill brought by the debtor against such as refused to take the composition after the time of payment had elapsed, the court refused to relieve the debtor, and dismissed his bill.

3. Plaintiff's

§3. Composition—partial Engagements.

D—e 463

3. Plaintiff's father applied to a scrivener to borrow 200*l.* The scrivener lent the money, and took the father's bond to *A.* and *B.* his clients, in which plaintiff and one *H.* were bound as sureties. The scrivener had the ordering of the monies, and received the interest for six years. Plaintiff and his father then failed, and *H.* died insolvent. The father compounded with his creditors for 7*s.* in the pound. The scrivener undertook to settle his clients debt for a composition of 10*s.* in the pound, which was paid him, and he engaged to give up the bonds; but his clients not consenting as he expected, they threatened to bring their action at law upon the bond: Upon a bill for performance of the scrivener's agreement, or to be indemnified by him, the scrivener by his answer admitted the agreement, which he stated to have made as the agent of his clients, though they refused to abide by it. Decreed the plaintiff to pay to *A.* and *B.* their principal, interest, and costs, and that the scrivener should reimburse the plaintiff.

H. 1690, cor. Lds Comrs.
Parrot v. Wells & Ux. and another,
2 Vern. 127.

Vide *Johnson v. Ogilby*, 3 P.
Wms. 277.

4. One by will devised the surplus, after debts and legacies paid, to his wife, and made *A.* and *B.* his executors. The creditors compounded for less than their full debts, from an apprehension there were not assets, but assets afterwards came in. On a bill by the wife for an account of the surplus, the executors would have let in the creditors to their full debts, which would have reduced the surplus to little; but the court would not set aside this composition, *the creditors having no bill for that purpose.*

M. 1699, cor. Somers, C.
Lord Castleton v. Lord Fanshawe,
Prec. in Ch. 99.
2 Eq. Abr. 254. c. 1. 259. c. 1.
1 Eq. Abr. 298. pl. 2.
S. C. but not S. P.

It was a question in this case, Whether the creditors should be sent to law to recover their debts, and the wife should make a defence in place of the executors, and by pleading the statute of limitations bar their debts, which the executors would not do? But Lord C. said he would not consent that the statute should be pleaded, therefore their debts must be paid.

5. If there be two dealers, and one of them is very much indebted to the other, and in order to get an abatement from him he makes him believe he is insolvent, by absconding, skulking, or shutting up shop, whereby the other has just cause to fear the loss of his debt, and thereby is induced to give a release, or make an abatement, when in truth the man is really solvent; the court will relieve against such release, &c. And this was agreed to have been often done. *Secus*, if the party had not just cause to fear the loss of his debt.

M. 1701, Canc.
Monger v. Kett, 12 Mod. 558.
2 Eq. Abr. 479. pl. 7.

6. *A.* was intrusted by *B.* to receive interest on tallies; he received the principal as well as interest, and

H. 1707, cor. Cowper, C.
Small v. Briskly, 2 Vern. 602.

and failed, and afterwards compounded with his creditors for *qs.* in the pound, but *B.* would not come in without having a better composition, which *A.* agreed to give. *A.* brought his bill to be relieved against this underhand agreement, but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the court would not relieve him. Bill dismissed.

M. 1721, cor. M. R.
Middleton v. Lord Onslow & al.
1 P. Wms. 768.
2 Eq. Abr. 254. pl. 3. 259. pl. 2.

Vide *Spurrett v. Spiller*, 1 Atk.
105. *Earl of Chesterfield v.*
Jansen, 2 Vef. 156. *Cockshot*
v. Bennett, 2 Term Rep. 763.

M. 1721, cor. Macclesfield, C.
Pollen v. Sir John Husband & al.
1 P. Wms. 751.
2 Eq. 254. pl. 2.

7. A wife, with the consent of her trustees, petitioned that she might set apart some of her portion in order to compound with her husband's creditors. The court ordered part of the trust money to be paid to the creditors consenting to discharge the husband, but some of them took private securities (post dated) from the husband before they would execute the deed of composition. The securities so taken were set aside, as a fraud on the wife.

8. Plaintiff was executor and trustee of the late Sir *J. H.*, and upon a decree to account, he was found indebted to plaintiff in 4000 *l.*, to avoid the payment whereof he fled beyond sea. In his absence it was agreed that he should pay a small sum to defendant as a composition, and that defendant should release and indemnify him against the creditors of the late Sir *J. H.* Plaintiff afterwards being threatened by several of testator's creditors, brought a bill for a specific performance of defendant's agreement, and that he should indemnify plaintiff against testator's creditors. Lord Chancellor—It was in defendant's power to make a composition, and to release the whole debt if he pleased. It was lawful for plaintiff to ask a composition, and for defendant to grant it. Equity ought only to guard against any fraud in obtaining the release or composition, but here defendant proposed the composition, and invited plaintiff to come into it. Plaintiff's agent put every thing in a true light, and defendant acquiesced. Besides, plaintiff being out of the jurisdiction, it might be for defendant's benefit to accept the composition, though small, there being a fair representation (u) on plaintiff's side, and a just compliance on defendant's. Decreed, that defendant do execute his agreement, and indemnify the plaintiff against testator's debts.

(u) Vide *Cann v. Cann*, 1 P.
Wms. 727.

§ 3. Composition—partial Engagements.

D—e 463

9. A. being upon an agreement for a composition of his debts, gives one of his creditors, who would not consent to it otherwise, a bond for the residue over and above his composition: such a contract, though not void by the express words of *Geo. 2.* seems to be within the reason and design of that act.

6 Nov. 1740, cor. Hardw. C.
Spursett v. Spiller, 1 Atk. 105.

So a person who has a composition on foot (may, by entering into a contract to pay the whole debt to an obstinate creditor, as an inducement for him not to appear and oppose the composition,) deceive the bulk of his creditors, who imagine his debts to be less numerous than they really are. *Vide Chetwold v. Janfen*, 1 Atk. 352. *Smith v. Bromley*, and *Jones v. Barclay*, Dougl. 670. Cowp. 792. *Cockshot v. Bennet*, 2 Term Rep. B. R. 763. *Jackson v. Duchaire*, 3 Term Rep. 551. *Jackson v. Lomas*, 4 Term Rep. 106. The case of *Sumner v. Brady*, 1 Term Rep. C. B. contradicts the authority of *Lewis v. Chase*, 1 P. Wms. 620.

10. A creditor for 1700*l.* agreed with his debtor (a failing man) to take 11*s.* in the pound, to be paid by instalments, and the debtor after the first payment became a bankrupt. Lord Chancellor inclined to think the 1700*l.* and not the amount of the composition only, might be proved under the commission.

29 Mar. 1743, cor. Hardw. C.
Ex parte Bennett, 2 Atk. 527.

When a creditor agrees to take less than his debt, provided it be paid precisely at the day, and the debtor fails of payment, the general rule of equity is, that he cannot be relieved.

Vide Sewell v. Maffon, 1 Eq. Abr. 28, pl. 3. 2 Vern. 210.

11. If trustees will bind themselves to be liable for the acts of each other, the court will not relieve them, especially in the case of a composition of debts.

4 Dec. 1747, cor. Hardw. C.
Leigh & al. v. Barry & al.
3 Atk. 583.

Where there is an agreement to pay the compounded sum at a day certain, and the person fails in the payment of it at the time, he must pay the whole debt to the creditor, for the court is so strict in regard to compositions that it will not relieve.

12. The defendant, among the other creditors of the plaintiff, accepted a composition of payment by instalments. The defendant took a new bond for half his demand, and only took the composition on the other half. This was held void, as a fraud on the creditors and on the wife of the plaintiff, who had joined in the security for the composition.

3 June 1793, Scacc.
Cecil v. Plaistow, 1 Anst. 202.

Vide Middleton v. Lord Onslow, 1 P. Wms. 768.

13. Upon a deed of composition, one creditor was prevailed upon by the debtor to represent his debt below the real amount, receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of

3 July 1797, cor. M. R.
Eastbrook v. Scott,
3 Ves. jun. 456.

Vol. II.

Hh

the

the dividend. Upon the bill of the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up; but the court was of opinion the defendant would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied, though not as against the creditors; and directed an inquiry as to that, reserving the question.

Of deeds obtained by fraud, compulsion, duress, or misrepresentation, see *ante*, tit. *Agreement, Bond—et pass.* tit. *Deeds, Fraud.*

Of partial payments and refunding of monies received, see *Bankrupt*.

SEC. 4. In what Cases one Debt shall be allowed to be set off against another in Equity.

M. 1689, cor. Lds. Comrs.
Chopman v. Derby, 2 Vern. 117.

Vide 1 Mod. 215.

27 Jan. 1701, cor. Wright, C. S.
Peters & al. v. Soame & al.
2 Vern. 428.

1. A Clothier sent cloth to a factor to sell for him, and then died. The administrator brought an action against the factor for the cloth. The factor cannot in equity deduct out of the value of the cloth a debt owing to him from the clothier, for if there be debts of a higher nature, it would be a *devastavit* in the administrator to pay or allow the factor's debt. But where there are mutual dealings between two persons, and one becomes bankrupt, the balance of the account only shall be paid to the bankrupt's estate.

2. D., receiver of the *New River* rent, assigned to plaintiff P. a bond, wherein defendants S. and G. were bound to him in 700*l.*, and this assignment was to indemnify him against two debts, for which he stood bound as surety for D., and in satisfaction for 30*l.* he owed the plaintiff. D. becoming a bankrupt, plaintiff P. could not sue in the name of D. at law, and therefore brought his bill to have the money decreed to him in equity. Defendant S. insisted to retain out of his bond the rent received by D. for four *New River* shares which D. had not paid over to him. D.'s assigners insisted to have the bond. *Per cur.*—The bankrupt was bound by the assignment, and the assignees stand in his place, but the court doubted whether defendant S. might not retain for his debt, and that

§ 4. Set off, where allowed in Equity.

D—c 467

that stoppage seemed to be a good equity in such case.

3. *A.* a clothier and *B.* a dyer had mutual dealings in trade, which they carried on for several years without payment of money on either side. *B.* died intestate, and indebted by specialty. His specialty creditors took out administration, and sued *A.* at law. *A.* brought his bill for an injunction and account. *Per cur.*—Though stoppage in general is no payment, and cannot in some cases be allowed (a), yet where it appears that there is a mutual dealing for several years without payment of money, it is a strong presumption of an agreement, and a liberty to retain against each other, without which the dealings would not have continued. It is the constant usage among merchants and traders to take goods of each other, and set off against each other. The statutes of bankrupts (7 G. 1. c. 31. & 5 G. 2. c. 30.) respecting mutual credits, deemed it reasonable to direct accounts to be taken in such manner. Decreed, the Master to take the account, and the plaintiff to take his costs out of the assets.

4. Stoppage is no payment at law, nor of itself a payment in equity, but a very slender agreement for allowing one debt out of another will make it a payment, because this prevents a multiplicity of suits. But it may be doubtful whether an insolvent person may in equity recover against his creditor to whom he owes a greater sum, though such seems to be against equity. However it seems, the least evidence of an agreement for stoppage will do, and in such cases equity will take hold of a very slight thing to do right to both parties; and it is still more reasonable, that where the matter of the mutual demand is concerning the same thing, the court should interpose, and make the balance only payable.

5. Plaintiffs and intestate had mutual dealings as tradesmen. Plaintiffs were indebted to intestate 30*l.* for paper, and intestate to plaintiffs 100*l.* for sugars. Intestate died, leaving no assets to pay. Defendant took administration as principal creditor, and then brought an action against the plaintiffs for goods sold by the intestate, and got a verdict and judgment. Plaintiffs then brought their bill, suggesting a *mutuatus*, and praying an account, and

H h 2

that

H. 1721, cor. Parker, C.
Downam & al. v. Matthews & al.
Prec. in Ch. 580.
2 Eq. Abr. 9. pl. 8.
Vide Lord Laneborough v.
Jones, 1 P. Wms. 325. Jeffs v.
Wood, 2 P. Wms. 128. Ex
parte Deane, 1 Atk. 228.

(a) As where a man having money due to him cannot stop his rent or a bond toward satisfaction of a simple contract debt.

P. 1723, cor. M. R.
Jeffs v. Wood & al.
2 P. Wms. 128.

Vide Curson v. African Company, 1 Vern. 122. Peters v. Soame, 2 Vern. 428. Downham v. Matthews, Prec. in Ch. 582.

M. 1724, cor. Macclesfield, C.
Hawkins & al. v. Freeman,
8 Vin. Abr. 500. 561.
2 Eq. Abr. 10. pl. 20.
Vide Downham v. Matthews,
Prec. in Ch. 580.

that deducting the debt due by them to the intestate they might have satisfaction out of the assets. Decreed, that defendant should acknowledge satisfaction on the judgment, and that an account should be taken between the parties, and the balance due to plaintiffs be paid in a due course of administration, but without costs, because defendant was an administrator.

T. 1728, cor. King, C. & M. R.
*Meliorucchi v. Royal Exchange
 Assurance Company,*
 1 Eq. Abr. 9. pl. 8.

Vide Demandry v. Metcalf,
 2 Vern. 691.

17 July 1740, cor. M. R.
Lock v. Bennet, 2 Atk. 49.
Vide Ridout v. Brough, Comp.
 133. 135.

17 Nov. 1740, cor. Hardw. C.
Les & al. v. Carter & al.
 2 Atk. 84.

14 April 1741, cor. Hardw. C.
Gariſb v. Donovan, 2 Atk. 166.
 2 Eq. Abr. 12. pl. 19.
Barn. 428. S. C.
nominis Gariſb v. Donaccon.

6. Plaintiffs were assignees under a commission of bankrupt against Sir J. B., and brought this bill against defendants to compel them to transfer to plaintiffs several shares in their stock, to which Sir J. B. was entitled. It appeared that Sir J. B. was a director of the company, and having so large a portion of stock, the company lent him 12,000*l.*, but not upon the security of his stock, yet the company insisted on a right to stop the stock until repayment. *Per cur.*—Defendants must permit plaintiffs to transfer the stock, since they cannot retain it under the statute of 5 G. 1. for the loan was not made by defendants in their corporate capacity, but as private persons.

7. Where there are mutual demands, a defendant in an action at law may as well set off upon the bankrupt act (5 Geo. 2. c. 30. s. 29.) as in common cases, upon the statutes of 2 Geo. 2. c. 22. s. 13. & 8 Geo. 2. c. 24. s. 6. And there is no occasion to go into equity, and pray an injunction and account.

8. Where there is a general trust of money for a club or voluntary society, a particular member cannot set off a private debt against a share he may be entitled to on a contingency which may never happen.

9. A bill being brought for relief as well as discovery, whilst an action at law was depending upon the same account, the court obliged the plaintiff to make his election; who electing to proceed at law, he amended his bill by striking out the part that prayed relief. The bill thereupon was dismissed of course, as praying nothing but a discovery; and the costs of the dismissal were taxed to the defendant at 38*l.* The plaintiff recovered judgment against the defendant in damages and costs to the amount of 440*l.*, and petitioned to set off the costs at law against the costs in equity.

Lord

§ 4. Set off, where allowed in Equity.

D—e 469

Lord *Hardwicke* thought it reasonable, and if the precedents (which he ordered to be searched) would justify him, said he would grant the petition; but he doubted whether the practice of the court would allow it, by reason that the bill of discovery had been dismissed.

10. A packer may retain goods till he is paid the price of packing; and if he has another debt due to him from the same person, the goods shall not be taken from him till he is paid the whole, notwithstanding the debtor is become a bankrupt.

There have been many cases to which the clause in the statute 5 *Geo. 2.* relating to mutual credit has been extended, where neither an action of account would lie, nor could the court of Chancery decree one.

Mutual credit is not confined to pecuniary demands only, but if a man has goods in his hands belonging to a debtor, it shall be considered as such.

8 June 1748, cor. Hardw. C.
Ex parte Deane, 1 *Atk.* 228.
Vide Blackst. Rep. 653.

Lord H. thought this a stronger case than *Demainbray v. Metcalfe*, 2 *Vern.* 691.

Vide French v. Fenn, 1 *Cooke's B. L.* 577. *Smith v. Hodgson*, 4 *Term Rep. B. R.* 211.

11. *B.* was a residuary legatee and surviving executrix of her husband, to whom *C.* and *O.* had given a joint bond. *C.* died, and the plaintiff was indebted on her own private account to *O.*, who became a bankrupt. Plaintiff brought her bill against his assignees for an injunction, and to set off what was due to her as executrix against her own debt to *O.* Lord *Hardwicke* denied the injunction, as such a set-off could not be made at law, he said; and there being no instance of its being allowed in equity, for the debts were due in different rights, and the 2 *Geo. 2. c. 22. s. 13.* does not comprehend it.

8 Dec. 1748, cor. Hardw. C.
Bishop v. Church & al.
3 *Atk.* 691.

12. No set-off can be allowed where the demand is in *auter droit*. So, if an action at law is brought against an executor for a demand due from the testator, he cannot set off that against a debt due from the plaintiff to him.

2 Feb. 1749, cor. Hardw. C.
Medlicott v. Bowes, 1 *Ves.* 208.

13. A man may set off a debt under the bankrupt act of 5 *Geo. 2.* as that act extends to all mutual debts, though not relative to the mutual credit between the bankrupt and other persons in the course of trade, and though the debts were of such a nature as could not be brought into a general account (a).

4 Feb. 1749, cor. Hardw. C.
Ryal & al. v. Rolle, 1 *Atk.* 185.
1 *Ves.* 375.

(a) *Vide Billon v. Hilde*, 1 *Atk.* 126.

H h 3

14. A

16 Aug. 1753, cor. Hardw. C.
Ex parte Prescott, 1 Atk. 230.

Lord Chancellor said, that in arguing this case no precedent had been cited pro or con; he should therefore determine according to the rules of equity, and make a precedent.

14. A creditor against the bankrupt for 100*l.* and 10*l.*, and debtor to him upon bond for 340*l.* payable on the 4th March 1756, with lawful interest, applies that he may set off his demand of 110*l.* against the principal and interest due on the bond as far as it will go, and not be obliged to prove his debt under the commission, and take a dividend upon it only. This is not in strictness a mutual debt, and yet it is a mutual credit; for the bankrupt gives a credit to the petitioner in consideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt he owes him upon simple contract, and therefore within the equity of 5 Geo. 2. An account directed by the court to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees.

12 Aug. 1754, cor. Hardw. C.

Ex parte Ockenden,
1 Atk. 235, 6, 7.

15. In March a commission of bankrupt issued against *Matthews*, he being then indebted to *Ockenden* in 286*l.* 7*s.* 10*d.* for grinding corn. *O.* had in his possession 36 loads and 3 bushels of wheat belonging to the bankrupt, part ground and part grinding, besides a great number of sacks. 16*l.* 5*s.* was due to him for grinding the corn, which was in his hands at the time *M.* became a bankrupt. The wheat was sold by the assignees by agreement between them and *O.* without prejudice to his claim, who applied by petition to be paid his whole debt out of the money arising by the sale. *Per cur.*—*O.* had no specific lien upon the corn and sacks, but a particular one only *pro tanto* as was due for grinding the corn in his hands, and the wheat belonged to the assignees.

Fide Blackst. Rep. 653.

Fide Demaindray v. Metcalfe,
Proc. in Ch. 419.

Where *A.* borrows a sum of money on the pawn of jewels, and is furnished sums afterwards on his note, the executor of *A.* shall not redeem the jewels without paying the money due on the notes.

Fide Dowman v. Matthews,
Proc. in Ch. 580. *Ex parte*
Dease, 1 Atk. 228.

The cases between clothiers and dyers and clothiers and packers are different from the present, it being always customary for them to make up their accounts by giving mutual credit, the dyer for his work and the clothier for his cloth.

5 Geo. 2.
Fide Billon v. Hyde, 1 Atk.
226.

Courts of equity go no further than courts of law in the cases of a set-off, upon the act relating to mutual credit.

§ 4. Set off, where allowed in Equity.

D—c 471

16. Under a commission of bankruptcy a man may prove a debt in right of his wife, and yet bring an action in his own right for a debt due to himself from the bankrupt (a).

A creditor by bond, and upon an account current also, may bring a bill in equity for the latter, and an action at law upon the former.

20 Dec. 1754, cor. Hardw. C.
Ex parte *Marlow*,
3 Atk. 315, 317.

In this case the debt due in right of the wife was secured to her by a judgment before marriage, consequently on the death of her husband it would survive to her.

(a) Vide Ex parte Botterill,
1 Atk. 109. Ex parte Crinios, 1 Bro. Ch. Ca. 270.

17. J. R. was entitled to a legacy of 400 l. under his father's will, which he assigned over to the plaintiff. Upon a bill for payment of this 400 l. and interest, defendant J. R. contended that he was indebted only on a partnership account, and insisted on paying only what was due on balance.

Per M. R.—It was a rule of justice in the Roman law (a) to set off one debt against another. That rule did not prevail in England till the dealings between bankrupts and others gave rise to its introduction by statute 5 G. 2. Equity then took it up restrictively, that there should be a connection between the demands. Lord Macclesfield laid it down, that the mutual dealing raised a presumption that the one should be set off against the other (b). Then came the statutes (c) which gave the courts of law power to set off in cases of mutual demands, but still it is under restrictions as in *Cod. L. 4. tit.*

26 June 1761, cor. M. R.
Whitaker v. Ruff, Amb. 407.

(a) Dig. L. 16. tit. de Compensations.

(b) Vide Downam v. Matthews, Prec. in Ch. 530.

(c) 2 Geo. 2. c. 22. s. 13. made perpetual by 3 Geo. 2. c. 24. s. 4.

31. l. 14. Where there is a deposit on one side, it cannot be detained against a demand by way of debt. So in *Mackenzie's Inst. of Scotch Law*, set-off can only be between debtors and creditors in their own right (d).

There is no case where a debt in one right has been set off against a debt in another right. It was said, the plaintiff's account ought to be set off, but, *Quæcunque per exceptionem perimi possunt in compensationem non veniunt* (e).

(d) See Dig. L. 16. s. 3. L. 23.

(e) Dig. L. 16. tit. 2. L. 14.

18. Motion on the part of defendant that the costs due to him from the plaintiff in C. B. in an action for the same matters as the present bill might be deducted from the costs due from him in equity. This motion was opposed by plaintiff's solicitor, who claimed a lien on the costs in C. B., and then the question was, Whether the lien of an attorney was subject to the equity of this claim in nature of a set-off? Rule discharged.

5 July 1793, Scacc.
Gabbis v. Chaytor, 1 Anstr. 279.

T. 1796, cor. Loughb. C.
Ex parte Quinten,
 2 V. g. jun. 248.

19. At law, there can be no set-off between joint and separate debts.

Of partnership debts, and of mutual and contingent debts and accounts, see *Account, Bankrupt, Trade*.

SEC. 5. Where Debts of a different Nature are due, and a general Payment is made, to which Debt such Payment shall be applied..

M. 1680, Canc.
Heyward v. Lomax, 1 Vern. 24.
 1 Eq. Abr. 147. pl. 1.
Ex parte Parris v. Roberts, 1 Vern.
 34.

1, **W**HERE a man owes money on mortgage, and other monies to the same person on account, for which he is not to pay any interest, and he makes a general payment; it shall be taken to have been paid towards discharge of the money due on the mortgage, because it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on account, for which no interest is payable.

H. 1681, cor. Nottingham, C.
Perris v. Roberts, 1 Vern. 34.
 2 Ch. Rep. 83.
 1 Eq. Abr. 147. pl. 3.
 Mr. Vernon says that the Solicitor-General was strong in his opinion against this decree. *et vide Lomax v. Heyward*, 1 Vern.
 24.

2. *A.* was indebted to *B.* by bond, (in which *H.* was his surety) and also to *B.* by simple contract. *A.* stated an account of both debts, and to secure the balance he made a bill of sale towards satisfaction of the whole. On a bill by the surety Lord Chancellor decreed the money arising by the bill of sale should be applied towards discharge of both debts in proportion, because both debts had been cast into one stated account, and a bill of sale made towards satisfaction of the whole debt.

T. 1687, cor. Jeffries, C.
Brett v. Marsh, 1 Vern. 468.
 1 Eq. Abr. 147. pl. 4.

3. A creditor by judgment, and also by bond, receives 200*l.* in part from the purchaser of the estate of the debtor, but it is not mentioned how it shall be applied. It being part of the purchase money shall be applied towards satisfaction of the judgment.

M. 1701, Canc.
Anon. 12 Mod. 559.
 2 Eq. Abr. 635. pl. 3.

4. If *J. S.* owes 40*l.* by bond for the payment of 20*l.* at such a day; and 20*l.* by contract to the same person, payable at the same day; and at the day *J. S.* pays 20*l.* without telling for which it is; it shall be a payment in equity upon the bond, because that is most penal upon him.

5. It

§5. General Payments, how applied.

D—e 473

5. It was held in this case that if a man is indebted to another for principal and interest, and pays money generally, it shall be applied in the first place to sink the interest. So if a man owes money upon a bond, and also upon a book debt, and makes a general payment, Lord Keeper said that it shall be first applied to discharge the book debt; but this was denied by the bar, for money shall be applied according to the intent of him that pays it; and where both parties are silent it shall be intended in discharge of that which is most beneficial to the debtor, viz. to sink the debt which carries interest.

But where the debtor declares he pays it on one account, and the creditor declares he receives it on another, it shall be applied according to the debtor's declaration.

6. Defendant was indebted to plaintiff on articles under hand and seal, as also on simple contract on a running account, and made several payments of sums in gross, and entered them in his own books as paid on account of what was due on the articles. *Per Lord Chancellor*—Though the rule be *quicquid solvitur, solvitur secundum modum solventis*, yet that is to be understood when at the time of payment he declares on what account he pays it; but if the payment be general then the application is in the party who receives, and the entries in the defendant's books are not sufficient to make the application.

Intention of the debtor, and besides the present resolution squares with the rule, that every man's act is to be construed most strongly against the actor.

7. *A.* contracted with *B.* to have his iron split at his mill, and made into hoops, and to pay as others did: upon this contract money is due to *B.* Afterwards *A.* undertaking to furnish the victualling office with a quantity of iron hoops at 24*l.* per ton, (the money becoming due for the same being to be paid at a certain day, or bills carrying interest to be then given him) makes another contract with *B.* for the hoops to be delivered to him in such convenient time as he might furnish the victualling office at 24*l.* per ton; and upon this agreement *A.* covenanted either to pay the money by a certain time, or at the expiration thereof to give a bond for it with interest at 6*l.* per cent. *B.* delivered all the goods agreed for by the contract, except 36*lb.* weight, which, by mistake, was delivered to a wrong person; and then the time limited for

M. 1702, cor. Wright, C. S.
Chase v. Box, 2 Freem 261.

Max. *Quicquid solvitur, solvitur secundum modum solventis.*

H. 1707, cor. Cowper, C.
Manning v. Wetherne,
2 Vern. 606.

1 Eq. Abr. 147. pl. 2.

Vide Heyward v. Lomax,
1 Vern. 24. *Perris v. Roberts*,
1 Vern. 34. notwithstanding
which the author of *Grounds and
Rudiments*, p. 283. says, the
principal case is the more equita-
ble resolution, viz. that the ap-
plication should be in the receiver,
else the payer might defer the
debt which carries interest, and
so ease himself of that charge
against both the interest and in-
tention of the debtor, that every man's act is

P. 1708, cor. Cowper, C.
Wentworth v. Manning,
2 Eq. Abr. 261. pl. 1.

for the delivery expired. *B.*, being acquainted with the mistake, offered to make up the defect of the quantity; but *A.* having no occasion for them, the parcel never was delivered; and *A.* never complained of any prejudice he received by the disappointment. Several sums were paid generally to *B.*, the last of which was 60*l.*, which was more than enough to satisfy the first contract; and afterwards another sum was paid, and an acquittance wrote upon the bond which was given upon the second contract; and *A.* placed several of these payments in his own book to the account of the last contract. The question was, Whether they should be intended to be applied to the discharge of what was due upon the *first* or *second* contract? And *per* Lord Chancellor, the money shall be first applied to the discharging of the demand upon the *first* contract, and the surplus to the discharge of the demand upon the *second*. A man that pays money may pay it upon what condition he pleases, and the person who receives it receives the condition with it; but then the condition must be expressed at the time of payment. It is most natural that the debt which was first contracted should be first paid. The money for which a discharge was given upon the bond, his Lordship allowed applicable to the last contract; and he from hence argued, that *A.*'s intent in his other payments was to discharge the debt due on the first contract.

H. 1744, cor. Hardw. C.
Wilkinson v. Sterne,
 9 Mod. 427.

8. If a person indebted by bond and mortgage pays money to his creditor generally, the creditor may apply it either in discharge of the mortgage or bond. *Aliter*, if the debtor declares to which account the money shall be applied at the time of the payment.

Of Debts due on Mortgage, and in what Cases the Mortgagee may tack other Securities to his mortgage, see *post*. tit. *Mortgage*.

Decree.

D—e

SEC. 1. Of drawing up, signing, entering, and inrolling a Decree: And herein of Caveats to prevent the same.

1. IN drawing up a decree it is not sufficient for the register to recite the bill and answer, and then add, that upon reading the proofs, and hearing what was alleged on either side, it was decreed, &c. &c. But the facts which were proved and allowed by the court as proved, must be particularly mentioned in the decree, otherwise if a bill of review be brought, those facts shall be taken as not proved, for else a decree could not be reversed by a bill of review.

2. A decree of dismissal, though not signed and inrolled, may be pleaded in bar to a new bill.

3. Upon an appeal from the Rolls to the Lord Chancellor, or from him to the House of Lords, no new matter to be insisted on.

Upon appeal from the Rolls to the Lord Chancellor, the cause is open, and the party is at liberty to read new proof, and offer what he can against the decree.

Wms. 300. 2 Atk 403.—The rule is, that on an *appeal* the whole case is open; but on a *re-hearing*, only so much as is *petitioned* against. *Hayward v. Colley*, Sel. Ca. in Ch. 48. and *Rawlins v. Powell*, 1 P. Wms. 300.

4. If after a decree a caveat be entered to stay the signing and inrolling, it stays the signing 28 days after the presenting the decree to the Chancellor to be inrolled, and notice given by the Chancellor's secretary to the clerk on the other side.

5. By the constant and established rules of the court of Chancery in *Ireland*, the drafts of a decree ought to be delivered to the adverse party or his attorney, who in eight days is to return the same, signed

H. 1683, cor. North, C. S.
Brand v. Brand, 1 Vern. 214.
1 Eq. Abr. 162. pl. 1.
Vide 2 Cha. Ca. 161. S. P.

H. 1684, cor. North, C. S.
Pritman v. Pritman,
1 Eq. Abr. 162. pl. 3.
1 Vern. 310.

T. 1710, Canc.
Tompson v. Waller,
Proc. in Ch. 295.
2 Eq. Abr. 81. pl. 2.

T. 1713, Canc.
Wright v. Pilling,
Proc. in Ch. 496.
2 Eq. Abr. 81. pl. 4. S. P.
Vide 1 Vern. 443. 2 Vern.
464. Gilb. Eq. Rep. 151. 1 P.

H. 1719, cor. Parker, C.
Burnet v. Theobald,
1 P. Wms. 609.
2 Eq. Abr. 280. pl. 2.

7 Mar. 1720, Dom. Proc.
Cbevers & al. v. Geoghegan & al.
2 Bro. P. C. 225.
7 Vin. Abr. 399. pl. 17.
2 Eq. Abr. 280. pl. 3.

(a) *Quere* if this is now the practice?

3 May 1725, Canc.
Vaughan v. Blake,
7 Vin. Abr. 400. pl. 25.
2 Eq. Abr. 280. pl. 5.

T. 1725, Canc.
Anon. Sel. Ca. in Cb. 21.
2 Eq. Abr. 280. pl. 4.

28 April 1726, Canc.
Parker v. Stanley,
7 Vin. Abr. 400. pl. 26.
2 Eq. Abr. 280. pl. 6.

M. 1726, Scacc.
Howel v. Lord Coningsby,
Bunb. 219.
2 Eq. Abr. 280. pl. 8.
When a cause comes on after the *posita* returned upon the equity reserved, the decree is never *nisi*, but always absolute.
Geale v. Winter, Bunb. 40.

13 Mar. 1727, Canc.
Morse v. Dubois,
7 Vin. Abr. 400. pl. 28.
2 Eq. Abr. 279. (n).

If a material party dies before a decree is inrolled, yet it may be inrolled afterwards; and if more than six months expire before the inrolment, yet by leave of the court it may be done after that time. *Duchess of Bucks v. Sheffield*, MSS. case. What may have supplied by motion is no objection to a decree. 24 Nov. 1721, *Banbury v. Bolton*, 7 Vin. Abr. 399. pl. 19.

4 July 1739, cor. Hardw. C.
Duchess of Bucks v. Sheffield,
Ambl. 586.

P. 1740, cor. Hardw. C.
Standish v. Redley,
2 Eq. Abr. 173. pl. 5.
Barn Rep. 463. 468.
2 Atk. 177.

signed by the counsel on that side (a), or make objections to the draft, before it can be regularly inrolled.

6. A decree may be altered upon proper application the same term it is pronounced, without a rehearing.

7. Ordered that no application shall be made against the minutes after a week, and no further time to be allowed to petition for a rehearing but within a week after that.

8. Matters proper to be excepted to upon the Master's report shall never be excepted to the decree after the report is confirmed.

9. It was a question in this case, whether a decree shall be *nisi* only where the bill is taken *pro confesso* after appearance.—Lord Chief Baron and Page, B. were of opinion it should be *nisi* only *hesitanter*. Hale, B. was clear that it ought to be absolute.

10. All appeals from the Rolls are to be made to the Lord Chancellor, and decrees made at the Rolls must be signed or approved by the Chancellor to make them decrees of the court of Chancery.

11. Defendants inrolled a decree after abatement, and held regular.

12. A. brought a supplemental bill containing new matter discovered since the filing of his original bill and a decree pronounced thereon, but not signed and inrolled; and at the same time a petition of rehearing in the nature of a bill of review, praying that the former decree might be rectified in the particulars complained of by the supplemental bill. *Per cur.*—Although this method is not yet of long standing, still there have been some precedents of it, viz. one in Lord Talbot's time and two in the present Chancellor's; and it is of itself a reasonable thing that this method should be allowed of where a decree is not signed and inrolled. It is founded upon

upon reason; because if *A.* should be obliged to sign and inrol a decree which he thinks himself aggrieved by, and then bring a bill of review, it would only tend to increase expence and vexation (*a*): whereas the method which *A.* has taken attains the justice of the case as fully as the other would.

v. Mackworth, 2 Atk. 40. *Wortley v. Birkhead*, 3 Atk. 811.

13. When a supplemental bill is brought for any new matter discovered since the hearing of a cause, before the former decree was signed and inrolled, if the defendant to such a bill is able to shew that there is no new matter discovered, he must take advantage by plea or demurrer (*a*), and it is too late to insist on it at the hearing (*b*).

(*a*) Where a decree has not been signed and inrolled, it is proper to bring a bill in nature of a bill of review, *vide Llewellyn*

23 June 1740, cor. Hardw. C.
Llewellyn v. Mackworth,
2 Atk. 40. *Barn.* 445.

(*a*) *Vide Baldwin v. Mackeron*,
3 Atk. 817.

(*b*) *Jones v. Jones*, 3 Atk. 217.

Where a decree is neither signed nor inrolled, a bill of review cannot be brought, but a supplemental bill in nature of a bill of review (*c*) may be filed.

(*c*) *Standish v. Radley*, 2 Atk.
178. *Wortley v. Wortley*, 3 Atk.
811. *Moore v. Moore*, 2 Vef. 596.

14. The court never suffers a decree to account to be signed and inrolled, because it ties up their hands from relieving, if there should have been any defect in the directions of the decree.

31 July 1742, cor. Hardw. C.
Staunton v. Oldham, 2 Atk. 383.

15. Where full directions have not been given, a supplemental bill may be brought in aid of a decree of the court of Chancery.

24 April 1744, cor. Hardw. C.
Dormer v. Fortescue,
3 Atk. 133.

16. No need to make persons parties to a bill who live out of the jurisdiction of the court; and a decree will not be void against such persons, though they are not made parties: it is usual, however, in such cases to reserve liberty to apply for further directions, that persons out of the jurisdiction may not be quite concluded, but may have liberty to apply for alterations in the decree by petition.

11 Dec. 1744, Canc.
Attorney-General v. Balliol College,
9 Mod. 409.

17. This appeal was brought to set aside some proceedings in the Exchequer of *Ireland* for irregularity. Appellant as a mortgagee filed his bill in *cur. scacc. of Ireland* to foreclose. Respondent by his answer impeached the appellant's securities as fraudulent and without consideration, and afterwards filed his cross bill against the appellant to set aside such securities. Appellant residing in *England*, a commission issued for taking his answer returnable

26 Nov. 1745, Dom. Proc.
Benson Esq. v. Vernon, Esq.
4 Bra. P. C. 546.

returnable *without delay*; but before the answer was taken appellant was afflicted with a disorder in his mind, and was incapable of business. Respondent proceeded in his cross cause to a sequestration for contempt, and procuring the original bill to be dismissed for want of prosecution, he obtained an order to hear the cross cause on the sequestration, and the bill taken *pro confesso*. Upon this hearing the appellant's securities were set aside, and the decree for that purpose was made up and inrolled with costs. On the appellant's recovery he moved to set aside the proceedings for irregularity, and obtained an order of reference. Whereupon the remembrancer reported, that where a commission issues returnable without delay, it is incumbent on the plaintiff's attorney to obtain and serve an order on the defendant to return such commission on a day certain, or otherwise the plaintiff may be at liberty to issue process, which motions had been made as cautionary by plaintiffs, though not required by the *written* rules of the court. The remembrancer thought the proceedings in this case were regular; but if otherwise, no advantage ought to be taken of any irregularity after a decree inrolled. Pending these proceedings appellant's answer was prepared and taken by the commission; but respondent having obtained an order for confirming the remembrancer's report absolutely, it could not be filed. Appellant then moved to have the process of contempt and the decree obtained on the sequestration set aside, and that his answer might be received tendering the certificates of his physician and apothecary as to his incapacity; but respondent insisting that no notice had been given him of a motion to set aside the report and order for confirming it, the court therefore made no order on the appellant's application. The appellant then renewed his motion, offering to pay respondent's costs, and at length two Barons out of three were of opinion that the decree being inrolled could not be set aside; but the third Baron dissenting, no order was made. Appellant's ultimate resource, therefore, was the present appeal insisting on the irregularity. Whereupon the Lords referred it to the Remembrancer to tax the costs of dismissing the appellant's original bill, and also of his contempts in the cross cause, and of all proceedings from the first process of contempt, upon payment of

of which, and also upon appellant's giving security in case future costs should be decreed against him, it was ordered that the sequestration should be discharged, the inrolment of the decree vacated, and the decree set aside, and that the order for dismissing the original bill should also be discharged and the original bill be retained, and that the appellant should be admitted to put in his answer in the cross cause; and, lastly, that the court should proceed in both causes according to the course of the court, and that the appellant should speed his original cause.

18. Plaintiff was an infant at the beginning of this suit, and so continued till within six weeks of the pronouncing the decree. He afterwards petitioned to have the inrolment of the decree set aside on account of his solicitor's neglect. Lord Chancellor doubted if he had power to open this inrolment on any terms, and ordered precedents to be searched (*a*), for that he was inclined to do it if he could. His Lordship said, no irregularity in the defendant can induce the court to set aside this inrolment; but any court will incline to open what is concluded, that the merits may come before the court, and that the plaintiff may have justice done him. Had the plaintiff fortunately continued an infant till after the hearing, he would not have been bound, but might when of age have brought a new bill on shewing cause (*b*). The plaintiff's being under age, till so near the hearing of this cause, is as strong an excuse as that of a plaintiff going beyond sea pending the suit. The precedents cited prove it to be discretionary (though not arbitrarily) to exercise this power, and there are sufficient circumstances in this case to induce the court to do it, but it must be upon payment of the costs of the day, &c. Wherefore decreed that the inrolment be discharged, and that the plaintiff be at liberty to apply for a rehearing.

ing to the circumstances; but when such judgment is entered on record, the court hold that they have his power to set it aside.—A decree then is of equal validity with a judgment.

19. Motion to vacate the inrolment of a decree. A caveat had been entered by the defendant, but not with the proper officer, therefore it became ineffectual. Plaintiff took advantage of the defendant's mistake, and had used the utmost dispatch to get his decree signed and inrolled. Lord Chancellor vacated the inrolment (though regular) as within the

10 Feb. 1749, cor. Hardw. C.
Kemp v. Squire, 1 Ves. 205.

(*a*) *Vide* Robson v. Cranwell, cor. Lord King, 8 Dec. 1731, where a bill was brought by a person of full age, who left money with his solicitor to see counsel and went beyond sea. A subpoena was served to hear judgment, but the solicitor not employing counsel the bill was dismissed with costs. This was held a bare dismissal by default, and the court, on plaintiff's paying costs, opened the inrolment, and set aside the order, giving plaintiff leave to make out the merits and apply to re-hear.

The second precedent cited was that of Benson v. Vernon, 4 Bro. P. C. 546, which see ante, in this section.

(*b*) Lord Chancellor compared this to the proceedings at common law, where a judgment being signed by default, though the plaintiff is strictly regular, yet the court will set aside that judgment, varying the terms accord-

23 Nov. 1749, cor. Hardw. C.
Ann. 1 Ves. 326.

the reason of the common law courts, setting aside judgments for surprize, even though very correct in other respects.

3 Aug. 1754, cor. Hardw. C.
Kinsey v. Kinsey, 2 Ves. 577.

20. A decree not signed and inrolled cannot be pleaded, but the plaintiff in a cross bill may by *caveat* stop the inrolment for 40 days, and by petitioning to re-hear may bring on both causes together.

3 Aug. 1754, cor. Hardw. C.
Anon. 3 Ark. 809.
Vide Kinsey v. Kinsey,
2 Ves. 577.

21. A decree must be inrolled before it can be pleaded in bar to a second suit for the same matter.

29 Mar. 1765, Dom. Proc.
Charles Esq. v. Right Hon. H. L.
Rowley, 6 Bro. P. C. 73.

22. The register's minutes of a decree dismissing a bill, are not pleadable in bar to another suit brought for the same matter; for minutes are but evidence of the judgment of the court, and the ground-work of the decree, and are by no means conclusive; being sometimes mistaken by the officer, and often rectified and varied by the court, upon a summary application.

Of an appeal from a decree, *vide post. f. 3.*

Of opening, reviewing, and reversing a decree,
vide post. f. 4.

SEC. 2. Of the Force and Effect of a Decree, who are entitled to it or are bound by it, and from what Time.

T. 1682, Canc.
Sir Thomas Harvey v. Montagu,
1 Vern. 57. 122.
1 Eq. Abr. 146. pl. 6.
162. pl. 3.

1. I N this case there were two executors, and one of them by decree was prohibited to receive any more money, or to meddle further with the testator's effects. A mortgagor to the testator who was present at the pronouncing of the decree (though no party to the suit) afterwards paid this executor 10,000^l. Decreed he should pay it over again.

H. 1684, cor. North, C. S.
Booth v. Rich, 1 Vern. 295.
2 Vent. 351.
Vide post. tit. Infant, Mortgage.

2. An infant shall not be foreclosed without having a day to shew cause when he comes of age. The proper way is, to decree the land to be sold to pay the debts; and that will bind an infant.

P. 1687, cor. Jeffries, C.
Selfe v. Madox & al.
1 Vern. 459.

3. A. being decreed to pay a sum of money, or to deliver to the plaintiff the possession of a house by

§ 2. Force and Effect—who bound.

D—e 481

by a certain day, conveyed the house to a creditor in satisfaction of a real debt. This shall not defeat the plaintiff of the benefit of the decree.

4. None but parties to a suit can be bound by the decree made therein.

M. 1687, cor. Lda. Comrs.
Natchbols v. Porter, 2 Vern. 113.

5. An administrator pays away all the assets in satisfying debts by specialty. Decreed to pay a debt by a decree, though he had no notice of the decree before he paid away the assets.

H. 1688, Canc.
Searle v. Hale, 2 Vern. 37.
M. 1688.
Searle v. Lane, 2 Vern. 38.

6. Where a feme covert agrees to join with her husband in making a surrender or levying a fine, and he dies before it is done, equity will compel her by decree (a) to perform the agreement.

the court made no decree in this case; but it was by consent referred to the arbitration of Mr. Serjeant Rawlinson.—Dict. per Mr. Murray, in *Thayer v. Gould*, in Canc. M. 13 G. 2.

P. 1688, Canc.
Baker v. Child, 2 Vern. 61.
1 Eq. Abr. 25. pl. 6. 60. pl. 1.

7. Money paid in pursuance of a decree, though it happened to be paid to a wrong hand, allowed to be a good payment.

T. 1690, Canc.
Chapman v. Duncombe,
2 Vern. 142.
As decrees are not pleadable at law, equity will indemnify those who pay money in obedience to their decrees, 2 Eq. Abr. 281. D. (n.)

8. A decree was made 5 Car. 1. that all the miners within the parish of D. as well for the time being as to come, should pay to the vicar for tithe the tenth dish of lead ore cleaned, &c. All present and future miners within the parish were held to be within the decree, and bound by it, though not parties, nor claiming in privity under any that were.

M. 1690, Canc.
Browne v. Boob, 2 Vern. 184.
1 Eq. Abr. 163. pl. 5.

9. A decree in equity obliges an executor in equal degree at least with a judgment at law.

P. 1693, in Seacc.
Shafte v. Powell, 3 Lev. 355.
This seems to be S. C. as
Stasby v. Powell, 1 Freem. 333. 2 Eq. Abr. 450. pl. 1.

10. Where there is a decree for a mutual account, the plaintiff on his own bill may be decreed to pay the balance of the account.

T. 1623, Canc.
Lady Stowell v. Cole,
2 Vern. 297.

11. No decree shall be made against an infant without giving him a day to shew cause after he comes of age.

H. 1697, cor. Jeffries, C.
Faikland v. Bertie,
Colles' P. C. 10.

12. A bill against husband and wife for matters concerning the wife; they both answered, and then the husband died. The cause is abated, and plaintiff cannot proceed upon a bill of revivor, for the widow shall not be bound by her answer made

H. 1697, Canc.
Anon. 3 Salk. 84.

VOL. II.

I i

dum

dum sub potestate viri: but she may abide by it if she pleases; and then the plaintiff may proceed, and the decree shall bind her.

M. 1697, cor. Somers, C.
Joseph v. Mott, Prec. in Ch. 79.
 2 Eq. Abr. 459. pl. 3.
Vide Morrice v. Bank of Eng-
land, Ca. temp. Talb. 222, 223.
Mason v. Williams, 2 Salk. 507.
Astley v. Powis, 1 Ves. 496.
Bligh v. Ld. Darnley, 2 P. Wms.
 621. *Waring v. Danvers*, 1 P.
 Wms. 297. *Darston v. Earl of Ox-*
ford, Colles's P. C. 229. 11 Vin.
 298. 1 Eq. Abr. 10. pl. 9. Prec.
 in Ch. 138. 3 P. Wms. 401. (n.)
 which case seems to have settled
 this point.

13. *A.* made his will, and died indebted to several persons by bond more than his personal estate would pay. A bond creditor brought a bill against the executor to have a discovery and account of the personal estate, and a satisfaction of his debt; at the hearing the executor made default, so there was a decree against him for an account and satisfaction out of the assets *nisi*, &c. Before the decree was made absolute, another bond creditor of the testator's brought an action at law against the executor upon a bond; he appeared, and because he could not plead this decree at law, suffered judgment to go against him by default; and the account being carried on before the Master, the question before him was, Whether he should allow this judgment on the account? And he being in doubt, reported the matter specially to the court, and his Honor was of opinion that the decree must be preferred; and it coming to be re-heard before Lord Chancellor, he was of the same opinion.

24 Mar. 1700, Dom. Proc.
Williams v. Williams, Executrix,
 & al. et à contra Colles's P. C.
 101.

14. A decree made against an infant, is *unless* cause after the attainment of full age.

H. 1701, Dom. Proc.
Darston v. Earl of Oxford & al.
Executors, Colles's P. C. 229.
 Prec. in Ch. 138.
 11 Vin. Abr. 298.

15. *A.* and *B.* were specialty creditors of *J. S.*, who died, and left an executor, against whom *A.* brought a bill in equity for discovery of assets, and to be paid his debt, and pending the suit the executor voluntarily paid *B.*'s debt. Upon an account decreed on *A.*'s bill against the executor, the latter craved an allowance of this payment, which was denied him. *Per Lord Keeper Wright*—The executor has had notice of *A.*'s bill before the payment, and a bill in equity is equal to an action at law, pending which an executor cannot make a voluntary payment of any debt. From this decree an appeal was brought *in domo procerum*, where it was reversed, principally, for that the debts were of equal degree, and since a decree in Chancery cannot be pleaded to an action at law brought against an executor upon another debt of equal nature, the executor might justify the payment of another debt of equal nature, even pending a bill in equity.

It is now the established doctrine, that a decree in Chancery is equal to a judgment at law, and where an executrix of *A.* who was indebted to divers persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands, and others of the creditors sued the executrix at law, where the decree not being pleadable they obtained judgments; yet the decree in Chancery being for a just debt, and having a real priority in point of time, not by relation to the first day of term, was preferred to the judgments, and the executrix was protected in her obedience to the decree, and all proceedings at law were stayed against her by injunction. *Vide Morrice v. Bank of England*, Ca. temp. Talb. 217. 4 Bro. P. C. 287.

§ 2. *Force and Effect—who bound.*

D—e 483

16. An executor pays bond debts before money on a decree against testator. *Per cur.*—Clearly he shall not be allowed those payments in his account, because a decree is equal to a judgment at law.

M. 1701, Cane.
Bishop v. Godfrey & al. Executors, Pres. in Ch. 179.
Vide Joseph v. Mott, Pres. in Ch. 79.

17. A decree shall not bind a remainder-man who is no party.

P. 1706, cor. Cowper, C. S.
Legate v. Sewell, 1 P. Wms. 91.
2 Vern. 551. Gilb. Ch. 253. 1 Eq. Abr. 394. pl. 7.

18. A devisee brought an original bill in nature of a bill of revivor, and the question was, Whether the defendant could make a new defence? *Per cur.*—Where the bill, though original, is only to supply the want of priority, and is in all other matters but as a bill of revivor, the decree ought to be carried on in the same manner as it would have been upon a bill of revivor if the plaintiff had claimed in priority. There is no reason why the devisee should not have the same advantage of the decree as an heir or executor, without again entering into the merits; and the decree ought not to be longer or shorter than the first decree.

P. 1706, cor. Cowper, C. S.
Clare v. Wardall, 2 Vern. 543.
1 Eq. Abr. 3. pl. 3.

19. A decree was made against a tenant in tail who had agreed to sell his estates; he stood out all process of contempt for not obeying it, and died; yet his issue were held not bound, as he could only affect his issue by fine or recovery.

H. 1708, cor. Cowper, C.
Powell v. Powell
Pres. in Ch. 278.

20. An executor may pay debts of a higher nature, or as high a nature, after a decree *quod computet*, where he has legal assets; but if he has only equitable assets, the court will not indemnify him: and where an executor after a final decree pays a bond, it is a mis-payment, for a decree is in nature of a judgment (a).

1703, cor. Cowper, C.
Mason v. Williams,
2 Salk. 307.
Vide Cro. Elis. 793. 2 And.
157. 1 Roll. Abr. 925. 927.
1 Sid. 21. Vaugh. 89. 5 Co. 28.
2 Ch. Ca. 54. 84. 2 Vern. 299.
Pres. in Ch. 79. 1 Vef. 214.
(a) This is only true so far as relates to personal estate, *vide*

Bligh v. Lord Darnley, 2 P. Wms. 621.

Morrice v. Bank of England, Ca. temp. Talb. 222. *Astley v. Powis*, 1 Vef. 496.

21. Where money is agreed to be laid out in land to be settled in tail, though a fine cannot be levied of such money, yet a decree can bind the money equally as a fine can bind the land.

M. 1710, cor. M. R.
Benson v. Benson,
1 P. Wms. 130.
2 Eq. Abr. 41. pl. 1. 720. pl. 2.

22. A decree between other parties may be read as a precedent, but not as evidence.

24 Jan. 1717, Dom. Proc.
Austen, Esq. & al. v. Nicholas,
Clerk, 2 Bro. P. C. 31.

23. After a decree *nisi causa* against an infant, on such infant's coming of age, and before the decree made absolute, he may put in a new answer.

M. 1718, cor. M. R.
Fountain and another v. Caine and another, 1 P. Wms. 504.
See *Napier v. Lady Effingham*,
be taken to an infant's answer,

1 P. Wms. 401. *Bennett v. Lee*, 2 Atk. 531. Exceptions cannot
Strudwicke v. Pargiter, Bunb. 338.

1 Dec. 1718, Canc.
India Company v. Elkins,
 2 *Eq. Abr.* 238. pl. 9.
 6 *Vin. Abr.* 365. pl. 13.

T. 1719, cor. Parker, C.
Monill v. Lowson,
 2 *Eq. Abr.* 167. pl. 13.
 4 *Vin. Abr.* 500. pl. 11.

In the margin of this case Mr. Viner says,—“*Note*; Parker, C. “seemed to take a difference “where trustees of the charity “are appointed by the donor, and “where no trustees are appointed, “but the lands are devised immediately to charitable uses: “—In the latter case there can “be no decree unless the Attorney-General be made a party; but “otherwise where trustees are “appointed by the donor.”—This “cause proceeded to a hearing, “and the objections were over-ruled, *per Parker, C.*”

10 Feb. 1724, Dom. Proc.
Lady Effingham & al. v. Sir John Napier, Bart. & al.
 3 *Bro. P. C.* 1.

H. 1725, cor. Lds. Comrs.
Whitcomb v. Whitcomb,
 9 *Mod.* 128.
 2 *Eq. Abr.* 517. pl. 12.

H. 1726, cor. King, C.
Sir John Napier v. Lady Effingham, 2 *P. Wms.* 401.
Affirmed in Parl. 3 *Bro. P. C.* 301.
Vide Fountain v. Caine, 1 *P. Wms.* 504. *Bennet v. Lee*, 2 *Atk.* 531. — *Note*; The consequence of an infant's putting in a new answer is, that he may examine witnesses a-new to prove his defence, which may be different from what it was before;

T. 1728, cor. King, C.
Sorrell v. Carpenter,
 2 *P. Wms.* 483.
 2 *Eq. Abr.* 680. pl. 7.
Vide Crisp v. Heath, 7 *Vin.* 52.
 pl. 2. *Garth v. Ward*, 2 *Atk.* 174.
Worsley v. Earl of Scarborough,
 3 *Atk.* 392.

24. A decree for costs necessarily follows a decree for payment of principal and interest.

25. Bill to establish a will, and to perform several trusts, some of them relating to charities. The bill was brought by some of the trustees against other trustees, and several *cestui que trusts*. The Attorney General need not be made a defendant; for some of the trustees of the charity being made defendants, there may be a decree to compel an execution of the trusts in the will relating to these charities. If there should be collusion relating to the charity, the Attorney General, notwithstanding a decree, may bring an information to establish the charity, and set aside the decree: so, if he is made a defendant, if there be collusion. Objected, that one of the trustees was not brought to hearing: answered, that he was named a defendant in the bill, but, being beyond seas, is not amenable to the process of the court; and therefore plaintiff may proceed without him; besides, the trustee was (in this case) a plaintiff in a cross cause, and so before the court. *Cur. concessit.*

26. An infant is not bound by the decree of a court of equity; but must have a reasonable time after he comes of age to shew cause against it.

27. In cases of trust, infants are always bound by decrees in Chancery; and so they are where the will of the ancestor is contested; and there is scarce any case where an infant has time to shew cause against a decree, but where it is necessary he should join in a conveyance to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure of mortgagors, &c.

28. Upon a decree against an infant, unless cause be shewn against it within six months after he comes of age, the infant may answer anew.

29. The court of Chancery will oblige all to take notice of its decrees as much as of judgments, but there does not seem to be the same reason for obliging people to take notice of the filing of a bill, for bills are often kept in the six clerks' desk, and it is a difficult matter to search for them.

30. Defendant

§ 2. *Force and Effect—who bound.*

D—e 485

30. Defendant having been examined as a witness for plaintiff, under the usual order, in a matter in which he was not interested, the plaintiff may have a decree against him as to other matters.

24 May 1731, cor. Jekyll, M. R.
Nightingale v. Dodd,
Ambl. 583.

31. It is said, that a decree is equal (a) to a judgment, or must be paid (b) next thereto. This must be intended only out of the personal estate, as a decree for a debt does not bind the real estate (c), acting only *in personam* and not *in rem*. The remedy upon a decree to affect the land is only for a contempt, whereupon the party proceeds to a sequestration, which is but a personal process (d), as appears from its abating by the death of the party, which an extent upon a judgment does not. Judgments did not affect lands until the statute of *Westminster 2.* (13 Ed. 1. c. 18.) which can hardly be thought to have included decrees; nay, plainly it does not, else it would affect only a moiety of the land, as a judgment does; whereas upon a sequestration plaintiff takes the whole profits. If a decree for a debt be obtained, and defendant dies, leaving no personal but a considerable real estate, the latter would not be affected by the decree in the hands of the heir, as in the case of a judgment; and were it otherwise, after so many thousand instances of deficiency of personal assets, surely some case would be found where land has been sequestered for such debts in the hands of the heir; but no such precedent was ever heard of, nor can land in such case be liable to the decree.

T. 1731, cor. M. R.
Bligg v. Earl of Darnley,
2 P. Wms. 621.

(a) *Vide* *Mason v. Williams*,
2 Salk. 507. *Searle v. Lane*,
2 Vern. 89. *Joseph v. Mott*,
Prec. in Ch. 79. *Martin v.*
Martin, 1 Vef. 214.

(b) *Harding v. Edge*, 1 Vern.
143.

(c) *Morrice v. Bank of Eng-*
land, Ca. temp. Talb. 222. *Ast-*
ley v. Powis, 1 Vef. 496.

(d) *Morrice v. Bank of Eng-*
land, *Wharam v. Broughton*,
1 Vef. 182.; but in *Hawkins v.*
Crook, 3 Atk. 504. it was said,
that although a sequestration on
misne process be determined by the
death of the party, yet it is
otherwise where it issues for non-
performance of a decree.

32. A decree of the court of Chancery determining a matter of right, is good evidence of that right, as to all persons claiming under the party against whom the decree was made, though at the distance of 100 years afterwards.

17 April 1732, Dom. Proc.
Borough Clerk, v. Whicbute,
Bart. and another,
4 Bro. P. C. 33.

33. If a feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession under this decree, and marries, the husband may assign such interest, for it is in nature of an extent.

T. 1733, cor. King, C.
Lord Carteret v. Paskeall,
3 P. Wms. 200.
Affirmed in Parl. 4 Bro. P. C.
168. *Vide* *Sir Ed. Turner's*
case, 1 Vern. 7. *Tudor v. Sa-*
myne, 2 Vern. 27. *Packer v. Wyndham*, Prec. in Ch. 419.

34. A decree of the court of Chancery is equal to a judgment in a court of law; and where an executrix of A., who was greatly indebted to several persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands (some

T. 1735, cor. M. R.
Affirmed *per Talbot*, C. in M.
1736, and in Dom. Proc. in
May 1737.
Morrice v. Bank of England,
Ca. temp. Talb. 217.
4 Bro. P. C. 237.
3 P. Wms 401. (n.)
19 Vin. Abr. 326, pl. 6.

of the plaintiffs being her own daughters); and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments. Yet the decree of the court of Chancery being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings at law stayed against her by injunction.

27 Jan. 1737, cor. Hardw. C.
Attorney-General v. Jaanes,
1 Atk. 355.

35. In an information by the Attorney-General for the regulation of a charity, the court of Chancery will give a proper direction as to the charity, without any regard to impropriety in the prayer of such information. And herein the case of a charity differs from all others, wherein the decree must be founded on the prayer of the plaintiff's bill.

8 Feb. 1737, cor. Hardw. C.
Herring v. Yee, 1 Atk. 290.
This cause stood over in order to make the wife a party.

36. A husband, tenant for life, remainder to his wife for life, brings a bill alone for the opinion of the court upon the settlement. Objection for want of making the wife a party allowed; for if the court should decree against the husband, the decree would not bind the wife.

26 Jan. 1739, on appeal, cor.
Hardw. C.

Davis v. Davis, 2 Atk. 24.

8 Vin. Abr. 423. pl. 35.

N. B. This matter was not determined; for the parties agreed to affirm the decree, and their agreement was made an order of court.

37. In this case Lord *Hardwicke* inclined to think, that where there is an amended bill, and no answer put in to it, the plaintiff is entitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

9 Oct. 1739, cor. Hardw. C.
Stifffield v. Dukes of Bucking-
hamshire, 1 Atk. 631.

Vide 2 Eq. Abr. 526. pl. 11. S. C.
from a MS. Rep.

(a) Vide *Gregory v. Molef-*
worth, 3 Atk. 616.

38. An infant, unless there is fraud or collusion, or new matter, is bound by a decree made for his benefit (a); and with respect to personal estate, except for the causes before mentioned, the parol never demurs.

Where there is a decree for the benefit of an infant, and he dies, his executor, though it may be for his own advantage to do so, shall never dispute that decree.

P. 1740, cor. M. R.
Atkinson v. Turner, Barn. 77.
2 Eq. Abr. 280. pl. 3.

2 Atk. 41. S. C. but not S. P.

29 Ap. 1741, cor. Hardw. C.
Sir T. Standish v. Radley,
2 Atk. 177. *Barnard*. 463. 468.
2 Eq. Abr. 173. pl. 5.

39. A decree cannot be pleaded in bar, unless it binds both parties.

40. It is altogether unnecessary to oblige a man to sign and enrol a decree made against himself in order to entitle him to bring a bill of review.

Where

§ 2. Force and Effect—who bound.

D—c 487

Where a decree has not been signed and inrolled, a bill in the nature of a bill of review is the proper one (a).

The discovery of new matter existing at the time of a decree, but not known till afterwards, entitles the party to a review.

(a) *Vide* Llewellyn v. Mackworth, 2 Atk. 40. Wortley v. Birkhead, 3 Atk. 811.

41. A decree against the lord of the manor will not bind copyholders in fee, or freeholders for life, who are no parties to it.

22 Feb. 1742, cor. Hardw. C.
Poore v. Clark, 2 Atk. 516.

42. In an action at law for fees no person need be a party but he who has received the fees. *Aliter* in equity, where if a bill is brought for an account of fees, and to establish a right, all persons who pretend to a right must be before the court (a), for they will be bound by a decree; but at law a judgment recovered for fees will not bind the right of a third person.

P. 1742, Canc.
Pawlett v. Bishop of Lincoln,
2 Atk. 296.

(a) *Poore v. Clark*, 2 Atk. 513.

43. Where there is a second suit between the same parties, an acquiescence under a decree in the first may be insisted on, unless the bill had been dismissed, *without any prejudice to the question* in that cause.

17 July 1742, cor. Hardw. C.
Shepherd v. Tisley, 2 Atk. 354.

44. Plaintiff in testator's lifetime obtained a decree against him *quod computet*. Soon after testator's death, and before the Master had reported what was due to the plaintiff, defendant as executor confessed a judgment to J. C. The Master then reported the judgment to be of a prior nature to plaintiff's demand under the decree to account. To this report plaintiff took exceptions. *Per Lord Chancellor*—The difference between a decree *quod computet* and a final decree was taken and settled in *Morrice v. Bank of England* (a). Decrees of this court are *here* put upon the same footing as judgments at law (b), though they have not obtained the same privilege *there*. It is allowed that if a decree is obtained against a testator or his executor *quod computet* it cannot be put upon an equality with a judgment confessed after such decree. A decree *quod computet* always concludes in the same manner, and makes no variation as to an executor, for before a final decree he may confess a judgment, and it does not at all alter the nature of the demand, notwithstanding the words in the decree *that each party do pay*. These words are only a direction to the Master, and no stress ought

3 Aug. 1742, cor. Hardw. C.
Smith v. Eyles, 2 Atk. 385.

(a) Ca. temp. Talb. 217.

(b) *Bligh v. Darnley*, 2 P. 621. *Searle v. Lane*, 2 Vern. 89. *Mason v. Williams*, 2 Salk. 507. *Bishop v. Godfrey*, Prec. in Ch. 179. *Martin v. Martin*, 1 Vef. 214.

to be laid upon them, for until the account is taken it is impossible to pronounce who will be the debtor or creditor. A decree *quod computet* is very properly compared to an *interlocutory* judgment at law, for it does not pass in *rem judicatam* till the final decree. It was contended in this case that the plaintiff's demand was for a liquidated sum, since nothing appeared by way of discharge on the Master's report. But Lord Chancellor would not admit of such nice distinctions, for the points with regard to assets were numerous enough already. His Lordship over-ruled the exceptions, and decreed the judgment creditor to be satisfied out of the testator's assets in preference to the plain-

(c) *Sic* Mason v. Williams, 2 Salk. 507. (where Lord Cowper said, an executor may pay debts of a higher nature after a decree *quod computet*, but not after a final one; for such a decree is in nature of a judgment.) Darston v. Earl of Oxford, Prec. in Ch. 188. Goodfellow v. Burchet, 2 Vern. 299. *Contra*, Joseph v. Matt, Prec. in Ch. 79. But it now seems settled, that where a decree is obtained at the suit of creditors for an account of the testator's personal estate, it will bind other creditors; and if they sue at law the court will award an injunction. Martin v. Martin, 3 Ves. 212. Douglas v. Clayton, cited 1 Bro. Ch. Ca. 184. Goate v. Fryer, 3 Bro. Ch. Rep. 23. Hardcastle v. Chatte, 4 Bro. Ch. Ca. 163 — *Vide etiam* Lothian v. Hassell, 4 Bro. Ch. Rep. 167.

7 Mar. 1746, cor. Hardw. C.
Trafford v. Boehm,
3 Atk. 448.

45. If a man is entitled to have money to be laid out in land, to be settled to the use of him and his heirs, he shall be entitled to the money in equity if he elects to take it. The court pursues the rights of parties, and whatever a court of common law does by a judgment, or Chancery by a decree, is in affirmance of those rights, and does not give them a right which they had not before; and it is on this ground that the court decrees the money to the parties entitled. Lord Chancellor mentioned this to shew that all which the court does is in consequence of an antecedent right; and there is no occasion for a decree, except where there is an incapacity, as in the case of a feme covert, who ought to be asked by the court, whether she consents that the money should be paid instead of being laid out in land in analogy to a fine at law.

15 Nov. 1746, cor. Hardw. C.
Worsley v. Earl of Scarborough,
3 Atk. 392.

46. A decree is not an implied notice to a purchaser after the cause is ended; but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what

(a) *Vide* Sorrel v. Carpenter, 2 P. Wms. 483. (n.) Garth v. Ward, 2 Atk. 174.

47. An infant is bound by a decree in a cause where he is plaintiff, as much as a person of full age (a).

21 Mar. 1747, cor. Hardw. C.
Gregory v. Moleworth,
3 Atk. 626, 627.

Vide Gregory v. Moleworth,

post. s. 4. which seems to be S. C. though it differs in point of time.
(a) *Sir Ducheſs of Bucks v. Sheffield*, 1 Atk. 628. *Lord Brook v. Lord Hertford*, 2 P. Wms. 519. The only exception to this rule is the case of *Lady Effingham v. Sir John Napier*, 2 P. Wms. 401. where, upon an appeal from Lord Macclesfield's decree with regard to real estate, the House of Lords gave the appellant leave to ſhew cauſe againſt his own decree when he came of age.

The rule at law is, that an infant is as much bound by a judgment in his own action as if of full age.

48. A commiſſion of bankruptcy cannot ſuperſede a decree for a receiver, which is a diſcretionary power exerciſed by the court of Chancery with as great utility as any ſort of authority that belongs to it; and is provisional only, and does not affect the rights of the parties.

11 Aug. 1747, cor. Hardw. C.
Skip v. Harwood, 3 Atk. 564.

49. There is undoubtedly a difference in practice between the courts of Chancery and Exchequer with regard to an account for tithes. In the Exchequer the account is directed from the filing of the bill only, but in Chancery to the time of the Maſter's report (a). A decree in Chancery for an account of tithes is not drawn up differently from a decree to account in other matters; but it is general to account for all tithes that are due without ſpecifying any particular period or limiting the account to a certain determinate time.

17 Dec. 1747, cor. Clarke, B.
abſ. C.
Bell v. Read, 3 Atk. 591, 2.

(a) *Vide Carleton v. Brightwell*, 2 P. Wms. 463. *Archbiſhop of York v. Stapleton*, 2 Atk. 136. but in the caſe of *Newt v. Chamberlain*, 1 Bro. P. C. 157. 1 Eq. Abr. 366. pl. 3. The Houſe, on appeal from the Exchequer, ordered that the tithes ſhould be continued to be paid in future.

50. The rule that an information for a charity is not to be diſmiſſed, but that there *muſt be a decree* for the eſtabliſhment thereof, holds only in the caſes of private charities, not where founded by the crown.

4 Mar. 1748, cor. Hardw. C.
Attorney-General v. Smart,
1 Veſ. 72.

51. There are ſeveral inſtances of relief, notwithstanding a former decree, if obtained by fraud and impoſition, which infects judgments at law and the decrees of all courts, and annuls the whole in the conſideration of the court of Chancery (a).

5 Aug. 1748, cor. Hardw. C.
Barnſly v. Powell, 1 Veſ. 120.

(a) *Vide Richmond v. Tayleur*,
1 P. Wms. 737.

52. One defendant not appearing, the whole line of proceſs againſt him is equal to the proceeding of outlawry at common law, and there may be a decree againſt the other defendants who appeared.

24 Feb. 1750, cor. Hardw. C.
Vanefſen v. South Sea Company,
1 Veſ. 395.
Vide Parker v. Blackburn,
Prec. in Ch. 99.

The

15 May 1750, cor. Hardw. C.
Penn v. Lord Baltimore,
 1 Ves. 444.

53. The bill in this case was for a specific performance of articles executed in *England* touching two *British* provinces in *America*. It was objected that the court of Chancery has not sufficient jurisdiction in such a case. *Per* Lord Chancellor—It is vain to make a decree if it cannot be enforced in the plantations. There are many cases where the court cannot enforce their own decree *in rem*; but that is no objection against making a decree, for the strict primary decree of a court of equity is *in personam*. Where therefore it is impossible to enforce a decree *in rem* it must be done *in personam*, by process of contempt and sequestration when the party comes to *England*; and if the parties want more they must apply to another jurisdiction. Decreed a specific performance of the agreement without prejudice to any right of the crown.

30 June 1750, cor. Hardw. C.
Astley v. Powis, 1 Ves. 496.

54. A decree in Chancery is not equal to a judgment at law to affect lands, though it is in a course of administration.

22 Nov. 1750, cor. M. R.
Sedgwick v. Hargrave,
 2 Ves. 57.

55. A husband was decreed to join, and also to procure his wife to join in a conveyance of her estate, pursuant to agreement, or to refund a sum received by the husband; but the court would not make a personal decree on the wife.

8 Mar. 1751, cor. Hardw. C.
Dixon v. Parker, 2 Ves. 223.

56. Lord *Hardwicke* took it for granted, though he did not know it was strictly the case, that a party cannot come into court and pray for a decree for costs only, where no decree can be had by him upon the merits.

4 July 1751, cor. Hardw. C.
Attorney-General v. Middleton,
 2 Ves. 328.

57. If an information brought to establish a charity prays a particular relief and method of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; and in such cases there is always this distinction, *viz.* where the charity is at large, or in its nature before the statute of charitable uses, and where it is incorporated by charter under the great seal.

24 Oct. 1752, cor. Hardw. C.
Finch v. Finch, 2 Ves. 492, 3.

58. Upon a bill to execute a trust, the first person entitled to the remainder and inheritance of the estate must be a party, if *in esse*; and if there be none in being, the trust must not remain unexecuted until a son be born; but the court must take facts as they stand, and the decree will be

§ 2. Force and Effect—who bound.

D—c 491

be good: for unless an after-born son can shew fraud or collusion, he will be bound by it.

59. Costs were decreed to all parties out of a real estate; one of them, who was entitled to receive costs, died before they were taxed, *non moriuntur cum personâ*, for the decree made a lien on the real estate, and the heir is entitled (a).

1 April 1754, cor. Hardw. C.
Blower v. Marrett, 3 Atk. 772.

(a) *Vide* *White v. Hayward*,
2 Vef. 461. *Kemp v. Mackrell*,
2 Atk. 812. 2 Vef. 579. *Hall v. Smith*, 2 Bro. Ch. Ca. 438.

If any thing had remained to have been done and not decreed, the representative of the deceased party, by reviving, would have been entitled to the costs, even if they had been directed to stand a charge on the real estate (b).

or administrator for costs, when costs have not been taxed, is upon this principle, that costs being looked upon as a wrong *moritur cum personâ*. All these cases have been determined where costs are decreed personally. Otherwise where decreed out of real estate.

(b) The general rule that there can be no revivor by an executor

A decree for a sum against an executor with costs out of assets, is not a decree *in personam*, but executory; and if he dies, the plaintiff may revive against the representative of the testator and pursue the assets (c).

The writ by *Journey's Accounts* lies only between the same parties; neither an executor, nor administrator, nor heir can have it; so that at law all costs are personal; but where there is a fund to answer costs, and it is made liable the representative by reviving will be entitled.

(c) *Vide* *Johnson v. Peek*,
2 Vef. 465.

60. In a bill for a partition, upon proof of title in the plaintiff, a decree is matter of right, however inconvenient the partition sought for may be.

6 July 1754, cor. M. R.
Parker v. Gerard, Bart.
Amb. 236. 1 *Eq. Abr.* 75.

Vide *Warner v. Baynes*, *Ambl.* 189.

Vide *Cartwright v. Lord Bath*, where the court gave plaintiff leave and time to make out his title.

61. The rule is, that if the plaintiff is entitled to relief against both defendants, and one of them ought to indemnify the other who is decreed to pay, the court often gives liberty to that defendant to prosecute the decree against the other, as where a surety pays money, the principal must undoubtedly indemnify the surety, and the court will make that decree over.

5 July 1755, cor. Hardw. C.
Walker v. Preswick, 2 Vef. 622.

62. One set of creditors brought a bill in the Exchequer for an account, upon which a decree was made for the account and payment of their debts. Another set of creditors brought a bill in Chancery

14 Nov. 1763, cor. Hardw. C.
Coysgarne v. Jones, *Ambl.* 613.
Vide *Newbury v. Wren*, 1 Vern.
221.

Chancery for the same purpose, and the court decreed the account, saying the decree in the Exchequer was incomplete.

17 June 1765, cor. Northingt. C.
Attorney General and others v.
Cholmley, Ambl. 510.

63. An allotment to the rector in lieu of tithes, under an agreement to which the ordinary was a party, and a decree confirming it held not to bind the successor.

1 Aug. 1785, cor. Thurlow, C.
Wall and others v. Bushby & Ux.
& al. 1 Bro. Cb. Ca. 484.

64. Infants are bound by a decree taken by consent, although no reference to a Master to inquire whether it was for their benefit.

20 July 1790, cor. Thurlow, C.
Allan v. Bower,
3 Bro. Cb. Ca. 149.

65. A final decree cannot be made upon an interlocutory order, without *consent*:—The parties must go to commission and hearing regularly.

Of the force and effect of a Decree of Foreclosure, *vide post. tit. Mortgage.*

SEC. 3. Who may appeal from a Decree, and in what Cases.

H. 1699, Dom. Proc.
Downing v. Coge,
1 Eq. Abr. 165. pl. 4.

1. **SIR G. D.** appealed to the Lords from a decree in Chancery made by consent, suggesting, that though the register in drawing up the order had drawn it as a decree by consent, (and the minutes were so too) yet he never did consent to such decree, nor his counsel neither, or if they did it was without his authority, and made affidavit of it; but the appeal was dismissed.

20 April 1701, Dom. Proc.
Handcock and another v. Spaen,
Bart. Administrator,
Colles's P. C. 122.

2. A person not a party in the original cause will not be suffered to interplead by a petition of appeal: but there not being proper parties to an original decree is a good ground of appeal.

29 Nov. 1721, Dom. Proc.
Banbury & Ux. v. Bolton & Ux.
2 Bro. P. C. 361.
7 Vin. Abr. 399. pl. 19.

3. Such defects in a decree as the court will rectify upon motion, are not sufficient grounds for an appeal against it.

P. 1731, cor. King, C.
Sheldon Esq. v. Aland,
3 P. Wms. 108.

4. No appeal lies from a decree or order of the Lord Chancellor or Lord Keeper in cases of ideocy or lunacy, save only to the king in council (a).

(a) It was so resolved in Dom. Proc. (14 Feb. 1726,) on the appeal of William and Samuel Pitt, after a long debate and reading the stat. 17 Ed. 2. *de prærog. regis* of Idiots, c. 9 & 10. In consequence of which resolution an appeal was brought before the King in Council, where, after some debate touching the jurisdiction, the matter of the appeal was heard and determined. So, *Rochfort v. Earl of Ely*, 6 Bro. P. C. 329.

§ 3. *Who may appeal, and in what Cases.*

D—e 493

5. No appeal to the House of Lords will lie against a decree before it is signed by the Lord Chancellor.

2 April 1735, Dom. Proc.

Barlow v. Bateman & al.

4 Bro. P. C. 194.

5 Vin. Abr. 88. pl. 8. 3 P. Wms. 65. S. C. but not S. P.

6. A bill in Chancery is never dismissed for want of parties, but stands over on paying the costs of the day. A decree of Sir *Joseph Jekyll*, and another in the court of Exchequer (a), to dismiss on this account, were reversed by the Lords.

M. 1737, cor. Hardw. C.

Ann. 2 Att. 15.

(a) This appears to be the case of *Green v. Poole*, 4 Bro. P. C. 122.

7. Where a bill is filed to set aside a conveyance for fraud, imposition, and want of consideration, and for other relief; and the court dismisses the bill so far as relates to the conveyance, but gives the plaintiff liberty to proceed at law as to the other matters, and in the mean time retains the bill, as to those matters; if the plaintiff neglects to proceed at law within a reasonable time, and suffers his bill to be absolutely dismissed for such neglect, he cannot afterwards complain of the decree by way of appeal.

25 Mar. 1747, Dom. Proc.

Rotberam, Widow, & al. v.

Browne & al.

4 Bro. P. C. 583.

8. Where a decree is made by consent of counsel there lies not an appeal or rehearing, though the party really did not give his consent, for his remedy is against his counsel; but if such decree was by fraud and covin, the party may be relieved against it by original bill, and not by rehearing or appeal.

10 May 1754, cor. Hardw. C.

Bradish v. Gee, Amb. 229.

Vide Downing v. Cage, 1 Eq.

Abr. 165. pl. 4. *Richmond v.*

Tayleur, 1 P. Wms. 734. *Floyd*

v. Mansel, 2 P. Wms. 73. *Har-*

rison v. Rumsey, 2 Ves. 488.

9. By a standing order of the House of Lords, of the 24 March 1725, the time for receiving appeals is limited to five years from the signing and inrolling of the decree; and therefore upon an appeal brought from two decrees of the 15th of July 1728 and the 5th February 1731, which were inrolled in March 1764, the House declared that the appeal ought not to have been received, and accordingly it was dismissed.

24 Jan. 1770, Dom. Proc.

Smythe & al. v. Clay & al.

6 Bro. P. C. 395.

In making this order the House is said to have considered the inrolment of any decree pronounced by the court of Chancery as being, by *legal relation*, the act of the same day on which the decree was pronounced.

10. Where a party to a suit sells and conveys all his right and interest under the decree to another for a valuable consideration, such sale and conveyance is an absolute bar to an appeal from that decree.

25 Jan. 1773, Dom. Proc.

Cusack & Ux. Executrix, v. Gil-

birt, Administrator,

6 Bro. P. C. 573.

11. Whereas

Ordo Curiae, 7 Feb. 1794,
Per Loughborough, C.
 4 Bro. Ch. Ca. 545.

11. Whereas by the practice of the court § 1. only is deposited with the register by the party who appeals from a decree, or obtains a rehearing, and only 40 s. on rehearing an exception to a Master's report, to answer the costs when the decree or former order is not altered, which is not a sufficient recompense, several rehearings being sought *merely for delay*. It was therefore ordered on 30th April 1701, that when any party appeals from a decree or obtains a rehearing of any cause or exception, such party shall in future deposit 10 l. upon re-hearing a cause, and 5 l. on re-hearing an exception, when the decree or former order is not materially varied, besides which such party shall be liable to such further taxed costs as the court shall direct. For the due observance whereof it is *now ordered*, that copies of the above abstracted order be hung up in all the Chancery offices.

See more, *ante*, tit. *Appeal*, et *post*. tit. *Rehearing*.

SEC. 4. Of opening, reviewing, and reversing a Decree; for what Causes, and in what Cases.

H. 1682, cor. North, C. S.
Ann. 1 Vern. 131.

1. UPON a motion for a re-hearing, where the decree was signed and inrolled by the late Lord Chancellor, Lord Keeper asked Mr. Serjeant *Moguard* if he knew any law whereby he could justify the re-hearing of a cause signed and inrolled by his predecessor, for that was to vacate a record. The Lord Chancellor himself was master of his own inrolments, and might upon his memory know some reason for re-hearing the cause; but Lord Keeper said, he could not do it unless there was some surprize or irregularity in inrolling it, though he had a privy seal that enabled him to sign and inrol the decrees of his predecessor.

H. 1682, cor. North, C. S.
Williams v. Mellish, 1 Vern. 117.
 1 Eq. Abr. 82. pl. 10.

2. A plaintiff is not allowed to bring a bill of review unless he first performs the decree, or swears that he is unable to do it, and surrenders himself to the *Fleet* till the matter be determined.

M. 1684, cor. North, C. S.
Plampin v. Betts, 1 Vern. 272.

3. Demurrer to a bill of review. Plaintiff by his original bill suggested, that all the receipts in question were lost, and prayed a discovery and account from defendant. Defendant by answer set forth

§ 4. *Opening, reviewing, reversing.*

forth his books of account, receipts and payments, and swore that he had received no other of plaintiff's monies. Plaintiff afterwards produced receipts differing from the books of account produced by defendant, and afterwards *Lord Chancellor Nottingham* made an order, that if plaintiff would make oath he believed the sums in question to be distinct sums, they should be taken as such. Upon *this*, as also that plaintiff's own oath should in some cases conclude, error was assigned; wherefore the decree was reversed, and *Lord Keeper* said, there was no colour to make such an order, but it would have been otherwise if the plaintiff's oath had been *ex abundanti* only, and there had been sufficient evidence without it.

4. Plaintiff was allowed to bring a bill of review without paying the costs decreed in the original cause (a), upon making oath he was not worth 40*l.* besides the matters in question.

150*l.* for which plaintiff had been in execution almost 20 years.

Although there is no limitation of time for bringing a bill of review, yet after a long acquiescence under a decree, *viz.* 22 years, the court will not reverse it but upon very apparent errors.

Smith v. Clay, *Ambl.* 645. but better reported 3 *Bro. Ch. Ca.* 639. (n.)

5. Upon a bill of review in this case it was assigned for error, that there was no ground for making the decree, only that it was made by the consent of plaintiff's counsel, and that he ought not to be concluded thereby. To this bill defendant pleaded and demurred (a), and upon debate of the matter *Lord Keeper* allowed both plea and demurrer, for that the decree being grounded on a consent, ought not to be impeached by the bill of review.

20 Nov. 1684, cor. North, C. S.
Smith v. Turner, 1 *Vern.* 274.

(a) It is presumed the defendant pleaded the former decree, and demurred to the bill of review.

6. A devisee obtained a decree to hold and enjoy against the heir, who it was supposed had suppressed the will. Pending this suit, a third person got an assignment of a mortgage made by the testator, and then purchased the equity of redemption of the heir, with notice of the will. The court would not permit the purchaser to dispute the justice of the decree, nor to try at law whether the will was not cancelled by the testator, in regard he had purchased *pendente lite*, and with notice of the will.

H. 1690, Canc.
Finch v. Newnham, 2 *Vern.* 216.
1 *Eq. Abr.* 163. pl. 6.

T. 1691, Canc.
Englefield v. Englefield,
 2 Vern. 236.
 1 Eq. Abr. 165. pl. 6.

7. A decree was made with a very liberal allowance for maintenance of an infant out of a trust estate, and not according to the trust. Upon a re-hearing, it was endeavoured to set aside the decree. *Sed per cur.*—Where an infant recovers by a decree of the court, the court may, with the approbation of the infant's relations, allot him a maintenance, though no provision in the trust for that purpose; and this is founded on natural equity; and though in the present case the decree went beyond natural equity, yet a decree being made in it the court could not reverse it, though possibly they would not have made the decree.

P. 1700, Canc.
Rockley v. Keyley,
 1 Eq. Abr. 126. pl. 12.

8. The commissioners of charitable uses cannot decree costs on the statute 43 *Eliz.*, but if there be an appeal from their decree, Lord Chancellor may decree the costs, not only of the appeal, but likewise of the commission. And although they do decree costs, yet that shall not, upon an appeal, be sufficient to reverse the decree; for Lord Chancellor may either increase or lessen the costs, or exempt the party from them entirely.

H. 1701, cor. Wright, C. S.
Johnson, Esq. & Ux. v. Northey,
Bart. & Ux. v. Northey,
 2 Vern. 409.
Proc. in Ch. 134.
nomine Blake v. Johnson,
 Vide 2 Ch. Rep. 128. Lloyd v.
 Mansell, 2 P. Wms. 73. Sheldon
 v. Fortescue Aland, 3 P. Wms. 111. Taylor v. Sharp, 3 P. Wms. 371. Kemp v. Squire, 1 Ves. 305.
 West v. Skip, 1 Ves. 245.

9. On a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses formerly examined, or new witnesses, but the court may examine the justice of the former decree upon the proofs already made in the cause.

H. 1702, Canc.
Norcot v. Norcot,
 7 Vin. Abr. 398. pl. 13.
 2 Eq. Abr. 279. pl. 1.

10. It is a rule, that whenever a decree is entered by consent, the merits shall never afterwards be inquired into, unless there be an objection, that the word *consent* be struck out of the order.

16 April 1702, Dom. Proc.
Hamilton and another v. Stephenson,
Esq. Colles's P. C. 213.

11. A decree obtained upon the defendant's answer in this case was not set aside, upon a suggestion that the defendant was imposed upon to put in that answer.

P. 1706, Canc.
Vare v. Wordall,
 1 Eq. Abr. 82. pl. 4.

12. An original bill barely in nature of a bill of revivor, does not open the first decree to have it looked into; but if it be to enforce a decree or carry it further, then it opens the cause.

T. 1706, Canc.
Grice v. Goodwin,
Proc. in Ch. 260.
 2 Eq. Abr. 281. pl. 1.
 1 Eq. Abr. 165. pl. 5.

13. Where error appears in the body of a decree drawn up and inrolled, the court will open the decree.

14. The

14. The defendant *C.* in 1712 brought a bill against the now plaintiff and *M.* his wife, who was the widow and executrix of *B.*, for an account of *B.*'s estate, and obtained a decree: then *M.* died; and before the decree was inrolled, the now plaintiff petitioned for a re-hearing, and at the same time preferred an original bill, suggesting new matter come to his knowledge since the decree, and obtained an order to re-hear the former cause. At the re-hearing of this cause &c., plaintiff's counsel admitted, that the decree in the former cause was just, upon the pleadings and proof in that cause; but insisted, that upon the pleadings in this cause, the merits appeared otherwise, and therefore prayed a new decree in favor of the now plaintiff, and to set aside the former decree: but Lord Chancellor dismissed the bill, and affirmed the former decree.

re-hearing the former cause; for the decree is right upon the pleadings and proof, and therefore cannot be varied upon a re-hearing; and it is contrary to the rules of the court to alter a decree upon an original bill exhibited after the decree is pronounced. Per Ld. Ch. in S. C.

15. Where a decree *nisi* is made absolute at the day, by the defendant's default, if he petitions for a re-hearing he must pay 10*l.* costs.

16. A bill was brought to establish plaintiff's right of common, and to set aside several former decrees. Defendant demurred to the whole bill; for if there was any error in the former decrees, there should have been a bill of review. Demurrer allowed.

17. An injunction was awarded by a decree, to put the plaintiff into possession of the premises in question, and at the same time the parties were directed to try the title at law. This decree is repugnant, and must be reversed as to the injunction.

18. Where matters have been examined in equity and determined, the court is cautious of unravelling former decrees, agreements, or releases.

19. A decree was made in this case against an infant (without giving her a day to shew cause). Upon a bill to set aside the decree, the court refused to set it aside, no fraud or surprise appearing, though in many respects the decree did not appear

T. 1715, cor. Cowper, C.

Hickes v. Conyers,

2 Eq. Abr. 177. pl. 2.

7 Vin. Abr. 398. pl. 15.

It is irregular to bring a new bill to vary a decree already pronounced. A defendant in this court may bring a cross bill before any decree pronounced in the original cause; and if the original cause is heard before the cross cause, the decree in the original cause may be afterwards varied by the decree in the cross cause; but in that case the cross bill must be brought before any decree made in the original cause. By the course of the court if the original decree had been inrolled, the now plaintiff upon affidavit of new matter come to his knowledge since the former decree, might have a bill of review; but he cannot now be relieved against the former decree by this new bill, and

M. 1718, in Scacc.

Walter v. Ruffel, Bunb. 90.

M. 1719, in Scacc.

Lord Granville & al. v. Ramsden & al. Bunb. 56.

Note; Matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review. 2 Eq. Abr. 176. pl. 14. (n.)

28 Ap. 1721, Dom. Proc.

Lord Laneshorough and another v. Elwood, Executrix,

2 Bro. P. C. 267.

7 Vin. Abr. 399. pl. 18.

2 Eq. Abr. 281. pl. 2.

T. 1721, cor. Macclesfield, C.

Cann v. Cann, 1 P. Wms. 723.

2 Eq. Abr. 281. n. to pl. 1.

M. 1721, cor. Macclesfield, C.

Richmond & Ux. v. Tayleur,

1 P. Wms. 734.

2 Eq. Abr. 516. pl. 8.

* Plaintiffs did not by this bill suggest that the infant had no day at semble.

appear to be perfectly equitable. In this case it was held, that if an infant is aggrieved by a decree, he is not bound to stay till he comes of age for redress, but he may impeach the former decree by an original bill (*a*), in which it will be enough for him to say, that the decree was obtained by fraud or collusion, or that no day was given him to shew cause against it.

(*a*) *Vide* Lloyd v. Mansel, 2 P. Wms 73. Galley v. Baker, Ca. temp. Talb. 201. Barnsley v. Powell, 1 Ves. 120. Wortley v. Birkhead, 3 Atk. 811.

Note; Mr. Cottingham, Lord Chancellor's Secretary, told the court that Mr. Vernon, in case of an erroneous decree against an infant, always advised the bringing of an original bill to set it aside, but in such bill to allege specially the errors of the former decree.

T. 1722, Canc.
Floyd v. Mansel,
Gilb. Eq. Rep. 185.

2 Eq. Abr. 280. pl. 7. 2 P. Wms. 73. S. C. nomine Lloyd v. Mansel.

20. No original bill can be to vacate a decree signed and inrolled.

M. 1723, cor. Macclesfield, C.
Hoyle v. Hoyle,
6 Vin. Abr. 626. pl. 17.
2 Eq. Abr. 491. pl. 3.

21. A decree *nisi* by default, was afterwards made absolute by default. The court refused to re-hear the cause, for that the costs on the first decree *nisi* were not paid, for the party cannot shew cause against a decree *nisi* by default, unless he pays the costs of the hearing *nisi*.

P. 1725, Canc.
Colchester v. Colchester,
Sel. Ca. in Ch. 13, 14.
2 Eq. Abr. 281. pl. 3.

22. On a new bill to carry a decree into execution, the court may vary and alter what is thought proper; but on a re-hearing, no farther than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is, if the petition be only against one or two particulars.

M. 1725, cor. King, C.
Wilson v. Dabbs,
Sel. Ca. in Ch. 50.
2 Eq. Abr. 238. pl. 17.

23. A decree was had by default, and on a petition for a re-hearing, the person in possession of the decree did not attend at the re-hearing. Bill dismissed with costs as to the petitioner.

H. 1726.
Rules on motion by King, C.
Anon. Gilb. Eq. Rep. 184.

24. If an original bill be brought for matters, part of which are contained in a former bill and decree, and part new or by way of supplemental bill, the court will on a demurrer to so much as was contained in the former decree, send it to a Master, to see what was and what was not in the first bill, and allow the demurrer accordingly.

12 & 17 Feb. 1727.
Jones & Ux. v. Kenrick,
15 Vin. Abr. 470. pl. 18.
2 Eq. Abr. 602. pl. 31.
3 Bro. P. C. 315.

25. A decree of foreclosure is not to be set aside after twenty years for matter of form only, upon a demurrer to a bill of review.

T. 1729, Canc.
Distrwood v. Blythway,
1 Eq. Abr. 317. pl. 3.

26. If a mortgagee has a decree of foreclosure, though that decree be signed and inrolled, yet if he

§4. Opening, reviewing, reversing.

D—e 499

he afterwards brings an action of debt on the mortgage bond, such action opens the foreclosure, and lets in the equity of redemption of the mortgagor.

27. A decree, and much more, an interlocutory order of the court, if gained by collusion, may be set aside on petition, as well as a judgment at law by motion, *a fortiori* may the same be set aside by bill.

28. Upon application to re-hear a cause, an order was made that the petitioner should be at liberty to re-hear, on payment of all the costs incurred since the decree, within a week after service of a taxed bill of costs. But on an appeal from this order, it was declared, that there was not a sufficient ground for the court's imposing these terms on the petitioner, but that it would have been sufficient if the court had required him to give security for, or submit to pay the costs in case the decree should not be materially varied upon the re-hearing.

29. In case of a decree of foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he will be only admitted to shew errors in the decree, not to ravel into the account, nor to redeem.

30. If a decree be obtained and inrolled, so that the cause cannot be re-heard, there is then no remedy to set it aside but by bill of review, which must be either for error appearing on the face of the decree, or for some new matter, as a release, receipt, &c. discovered since.

31. Ordered, that no supplemental or new bill in nature of a bill of review, grounded upon any new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the court first obtained for that purpose; and unless the party exhibiting the same do first deposit with the register of this court so much money as, together with the deposit by the rules of this court to be made, on obtaining a re-hearing of the cause wherein such decree was pronounced, will make up the sum of 50*l.* as a pledge to answer such costs

K k 2

and

P. 1731, cor. King, C.

Seldon, Esq. v. Aland,

3 P. Wms. 111.

2 Eq. Abr. 281. pl. 13.

Vide *Richmond v. Tayleur,*
1 P. Wms. 737. *Lloyd v. Man-*
fel, 2 P. Wms. 73.

19 Mar. 1733, Dom. Proc.

Dutcheff of Hamilton v. Manby,

Administrator,

4 Bro. P. C. 152.

H. 1734, cor. Talbot, C.

Mallack v. Galton,

3 P. Wms. 352.

In *Lyne v. Willis*, at the Rolls,
13 May 1730, this was admitted
to be the settled practice. 1 Eq.
Abr. 11. pl. 16.

T. 1735, cor. Talbot, C.

Taylor v. Sharp, 3 P. Wms. 371.

2 Eq. Abr. 177. pl. 19.

Vide *Standish v. Radley,* 2 Atk.

177. *Gould v. Tancred,* 2 Atk.

533. *Norris v. Le Neve,* 3 Atk.

27. *Wortley v. Birkhead,* 3 Atk.

809. 2 Vef. 591.

17 Oct. 1741, *per* Ld. Hardw. C.

Ordo Cur. 2 Atk. 139. (n.)

In *Moore v. Moore,* 2 Vef. 598.

Lord Hardwicke commented on
this order, and gave his reasons
for making it. His lordship said,
that though a bill of review could
not be brought upon a decree
signed and inrolled for new mat-
ter in being at the making of the
decree, but afterwards discovered,
without leave of the court, and
a deposit of 50*l.*; yet a mode has
been adopted of filing supple-
mental bills in nature of bills of
review at large, without leave or
deposit, and then bringing a po-

tition to re-hear or appeal. This was growing into abuse, and many such bills were brought for vexation. To put these improper bills of review under the like restraints as the other, his lordship made that order. Another reason for making that order was, that men were, at a great expence, obliged to sign and inroll; which was absurd. The rule upon strict and proper bills of review is, that the decree can be varied only upon apparent errors, either on the face of it, or errors of injustice upon new matter on the real merits of the case, unless any consequential matter arises; for if there is a consequential direction, the justice of which depends entirely on the variation made, the court may vary that consequential direction in favor of justice; and that is the practice of the House of Lords, who will vary a decree in favor of a respondent in any matter consequential to the relief they give to the appellant; and it is the same on a bill in the nature of a bill of review.

and damages as shall be awarded to the adverse party, in case the court shall think fit to award any, at the hearing of the cause on such supplemental or new bill.

23 Mar. 1742, cor. Hardw. C.
Gould v. Tancred, 2 Atk. 534.

(a) *Vide* Wortley v. Birkhead,
3 Atk. 811.

(b) *Vide* Dancer v. Evett,
1 Vern. 392.

23 Mar. 1742, cor. Hardw. C.
Rennet v. Lee, 2 Atk. 529.
Vide Bennet v. Vade, 2 Atk.
324. of which case this is a branch.

30 Oct. 1742, cor. Hardw. C.
Attorney-General v. Turner,
Montgomery v. Turner,
Amb. 587.

M. 1750, cor. Hardw. C.
Oates v. Chapman,
1 Ves. 542. 2 Ves. 100.

32. The leave of the court must be asked before a bill of review for *new* matter can be filed. *Secus*, if brought to reverse a decree, upon error appearing on the face of it (a).

A defendant may plead the decree, and demur against opening the inrolment to a bill of review brought for error apparent; and on the plea and demurrer the court will judge whether there are grounds for opening the inrolment (b).

33. Where parties apply for leave to bring a new bill upon new matter discovered after a decree, they must shew that it is relevant, for its being merely *new matter* will not entitle them to such a bill.

On a bill of review after two trials at law, and a decree to establish a will, upon discovery of new matter another trial was ordered, whereupon a verdict was found for the heir at law, and the former decree was reversed.

34. An order made by Baron *Clarke* for allowing a demurrer was now reversed; but defendant having immediately levied 5 *l.*, the costs of allowing it, it was prayed, that in drawing up the order of reversal, it should be with costs to be returned to the plaintiff. Lord Chancellor thought it reasonable that the costs should be refunded, the case being the same as if the demurrer was disallowed originally. The register being consulted, knew of no precedent, nor could any one be found, wherefore his lordship made one, by decreeing the 5 *l.* to be refunded, agreeable to the general rule of law, and to the practice of all other courts, either on reversal of a decree, or of a judgment on a writ of error.

35. Demurrer

§4. Opening, reviewing, reversing.

D—e 501

35. Demurrer to a bill of review, because no errors on the face of the decree, and besides there was length of time which would prevent opening the inrolment. *Per* Lord Chancellor—This is not proper matter for a demurrer; it should be pleaded, for several exceptions may take it out of the length of time, as infancy or coverture, which the party would lose the advantage of shewing if demurred to. There is error on the face of the decree in this case. Over-ruling this demurrer is of less effect than over-ruling any other, for it is only to open the inrolment that the court may hear the cause as it stood with all the subsequent facts. Lord Chancellor over-ruled the demurrer, and refused to save the benefit of the exception of length of time which was desired.

14 Dec. 1750, cor. Hardw. C.
Gregor v. Molefworth,
2 Vef. 109.
Vide *Gregory v. Molefworth*,
ante, f. 2. which seems to be S. C.

36. Lord Chancellor in this case refused to set aside a decree obtained by consent of counsel on both sides, as contrary to an established rule.

30 July 1752, cor. Hardw. C.
Harrison v. Rumsey, 2 Vef. 433.

37. After a decree is signed and inrolled, an original bill cannot be brought to affect or alter it, unless obtained by fraud.

3 Aug. 1754, cor. Hardw. C.
Wortley v. Birkhead,
3 Atk. 809. 2 Vef. 571.

Where a decree is signed and inrolled, a bill of review must be brought (a); and where not signed and inrolled, application must be made to the court to bring a supplemental bill in nature of a bill of review (b).

(a) *Vide* *Taylor v. Sharp*, 3 P. Wms. 371. *Gould v. Tancred*, 2 Atk. 334. *Norris v. Le Neve*, 3 Atk. 26.
(b) *Lewellin v. Mackworth*, 2 Atk. 40. *Standish v. Radley*, 2 Atk. 177. *Moore v. Moore*, 2 Vef. 597. *Musfel v. Morgan*, 3 Brs. Ch. Ca. 74.

38. Where a bill of review is filed for reversing a former decree, and besides specifying errors in the decree contains *original* matter, and is filed without leave, it ought not to be set aside for irregularity; for under these circumstances it should be considered as a cross-bill.

12 Mar. 1755, Dom. Proc.
Houghton v. West Widow & al.
5 Bro. P. C. 152.

39. A bill of review, for error apparent, will not lie after 20 years from making the decree. The time runs from the decree and not from the inrolment.

10 May 1767, cor. Camden, C.
Smith v. Clay, Amb. 645.
1 Eq. Abr. 82.
Vide *Edwards v. Carrol*, 5 Bro. P. C. 466. which is decisive on this point.

The same doctrine holds in the case of a bill of re-hearing.

40. As bills of review occasion great delay and expence, they must be better founded than upon mere irregularity in point of form, which is no sufficient reason for opening a record. There must be injustice apparent upon the face of the

28 Jan. 1768, Dom. Proc.
Hartwell Esq. v. Townsend Clerk & Ux. & al
6 Bro. P. C. 289. 306.

record, and that to a party to the suit; for neither an assignee or devisee can have relief by such a bill.

Though the plaintiff, in a bill of review, is confined to errors upon the face of the record, and cannot go out of it, yet the defendant is at liberty to allege every matter relevant to his defence, whether in or out of the record, by way of plea, as a release, &c. to prevent disturbing the decree; nor has he any other method of introducing it: and when pleaded, the matter alleged is sufficient to preclude the defendant from the review he seeks.

17 April 1790, cor. Thurlow, C.
Musfel v. Morgan,
 3 Bro. Ch. Ca. 74.
Vide Richmond v. Tayleur,
 1 P. Wms. 734. Wortley v.
 Birkhead, 3 Atk. 809. Bradish
 v. Gee, Amb. 229.

M. 1791, cor. Thurlow, C.
Hill v. Chapman,
 3 Bro. Ch. Ca. 391.

P. 1795, Scacc.
Wooly v. Drag, 2 Anstr. 551.

41. A decree, though obtained by fraud or collusion, cannot be set aside by petition; but it may be done by a re-hearing; or by an original bill in the nature of a bill of review, by which new matter may be brought before the court.

42. Where a new person or interest is brought before the court by supplemental bill, it is open to the parties to make any objection to the decree, which they might have made at the first hearing.

43. A petition for a re-hearing, or for leave to file a bill of review, was held bad for the uncertainty; and the prayer for a re-hearing in this case was irregular, as the decree was signed and inrolled.

Of opening, reviewing, and reversing a Decree of Foreclosure, see *post*, tit. *Mortgage*.

SEC. 5. Of reviving a Decree

M. 1684, cor. North, C. S.
Dan v. Allen, 1 Vin. Abr. 283.
Qu. If an assignee may not
 bring a bill in nature of a bill of
 revivor, 1 Harr. Ch. Prac. 302.

Lord Chancellor disallowed the *sci. fa.* in the principal case, but without costs, because defendant might have demurred, which he did not.

At law, if there be a judgment for an annuity, and the annuitant afterwards sells the annuity, the vendee shall have a *sci. fa.* upon this judgment.

H. 1686, cor. M. R.
S. C. nomine Dunn v. Allen,
 1 Vern. 426.

1. AN assignee may revive a decree by *sci. fa.* if it be signed and inrolled, but not otherwise.

2. A purchaser or assignee, claiming as such, and not coming in in privity, cannot revive either by *scire facias* or bill of revivor in any case, but may bring an original bill to carry the former decree into execution by a parallel decree.

3. A ob-

3. *A.* obtained a decree against a husband and his wife as administratrix of *T. S.* for 1500*l.* The wife died.—Plaintiff may proceed against the husband without reviving against the administrator of the wife, she having been once charged; but the husband is not bound to answer farther than the estate he had with his wife.

M. 1690, cor. *Lds. Comrs.*
Jackson v. Rawlins, 2 *Vern.* 195.
1 *Eq. Abr.* 3. pl. 10.

4. Plaintiff's intestate obtained a decree against defendant for a sum of money, and also for conveying lands and delivery of deeds; but before any thing was done he died. Plaintiff brought a *scire facias* to revive; defendant demurred, because the heir was not a party, and a decree cannot be revived by parts. The court allowed the demurrer as to the realty, but ordered the decree to be revived as to the personalty.

M. 1701, *Canc.*
Ferris v. Cherry,
1 *Eq. Abr.* 3. pl. 11.
2 *Vern.* 384. and 1 *Eq. Abr.*
331. pl. 5. *S. C.* but not *S. P.*

5. A decree may be revived by bill of revivor as well as by *scire facias*.

12 *Mar.* 1706, *Dom. Proc.*
Cole Widow and another v. Godfrey Executrix, *Colles' P. C.* 354.

6. Where a bill in equity abates by death, if the executor or administrator will not revive in six years it is within the statute of limitations; but if there be a decree to account, and the suit afterwards abates by death, and the executor or administrator does not revive within six years, then it is not within the statute.

M. 1721, cor. *Macclesfield, C.*
Hollinghead's case, 1 *P. Wms.* 742.
2 *Eq. Abr.* 2. n. pl. 3.
579. pl. 7.

7. Plaintiff, as executor, brought a *sci. fa.* to revive a decree pronounced against defendant 23 years before, at the suit of his testator. *Per curiam*—Plaintiff must not proceed farther in his suit without producing a sufficient probate of the will, or without leave of the court in respect of the staleness of his demand. If there be *bona notabilia* in divers dioceses, it is not sufficient that the executor shews proof of the will in the court of one of the ordinaries, but such proof must be made in the court of the archbishop of *Canterbury*.

M. 1721, cor. *Macclesfield, C.*
Comber's case, 1 *P. Wms.* 766.

8. The same defendants who made default in a former cause, made default again at the hearing of a supplemental cause, where the bill was brought by new assignees under a commission of bankrupt, chosen since the decree *nisi* in the first cause; the prayer of the supplemental bill was only that these defendants might shew cause, whereas they should have prayed that defendants might shew cause why the former decree *nisi* should not

24 *May*, 1745, cor. *Hardw. C.*
Brown & al. v. Martin,
3 *Atk.* 228.

(a) *Vide* Anon. 1 Atk. 38.

be made absolute. *Per cur.*—Let the former decree be revived (a), and let the present plaintiffs stand in the place of the former plaintiffs, and be at liberty to serve the defendants with a subpoena to shew cause against the former decree.

SEC. 6. Of the Performance and Execution of a Decree, and of the Disobedience and Contempt thereof. How such a Contempt shall be cleared, and how far the Estate or Representatives of a Person in Contempt shall be bound.

Anon. 2 Ch. Rep. 151.
1 Eq. Abr. 352. pl. 1.

1. IF a defendant is in contempt and in prison for not performing a decree, the court will order a sequestration against his real and personal estate.

Decrees are executed by process both against persons, goods, and lands, as judgments at law; but the execution is more effectual, because all may issue together.—Real and personal estates are both bound by a decree. 2 Eq. Abr. 231. (D. n.)

T. 1682, cor. Nottingham, C.
Burdett v. Rockey, 1 Vern. 58.
Vide Anon. 1 Vern. 116.
University College v. Foxcroft,
1 Vern. 166.

2. A sequestration which issues as mesne process, determines by the death of the party; otherwise if it issues after a decree, though for a personal duty.

A sequestration shall bind from the time it was awarded, and not only from the time of executing it.

T. 1687, in Scacc.
Guavers v. Fountain,
2 Freem. Rep. 99.
2 Eq. Abr. 281. pl. 1.
710. pl. 1. n.

Jenner, Heath, and Powell, Barons, thought that if it might be granted in mesne process, where it did not appear whether there was any duty or not, a fortiori, it ought to be granted after a decree, where the duty was adjudged and ascertained; and it being always the practice of Chancery, it ought much more in this court, where the plaintiff was supposed to be a debtor to the king. The jurisdiction of a court of equity would be to little purpose, if the court had not sufficient authority to see their decrees executed. Ld. Ch. Baron doubted, because Lord Hale could never be prevailed upon to grant it, nor Lord Montague, to whose learning, he said, he must greatly subscribe. But by the opinion of the other three it was granted.

Note; A sequestration issuing as mesne process is determined by the death of the party, but not if in pursuance of a decree.

3. The question in this case was; Whether the court of Exchequer should grant a sequestration after a decree for a personal duty? It was admitted, that in process for appearance a sequestration was always grantable by this court, for a personal duty only; but after a decree there were many instances in Lord Chief Justice Hale's time, and in Lord Montague's time, where it had been denied: the precedents cited were mostly cases at the suit of the king; and it was admitted, that where the king was plaintiff it might be granted.

4. After

§ 6. Performance—Disobedience—Contempt. D—e 505

4. After a writ of execution, and an attachment returned, for not performing a decree for payment of money, the court will not give the defendant leave to be examined unless he gives security to perform the decree.

M. 1688, cor. M. R.
Roper v. Roper, 2 Vern. 91.
1 Eq. Abr. 166. pl. 3.

5. Defendant (a feme covert) was taken on an attachment, for not performing a decree, and the officer refused to carry her before the Register, but carried her to *Newgate*. Upon motion that defendant might appear before the Register and be discharged, the question was, Whether, by the course of the court, she should be discharged upon appearing, or answer in custody? *Per M. R.*—There is an undoubted difference between a contempt to the honour of the court, and the breach of a decree: upon the first the party is to answer *in vinculis*; but not, upon the latter. Defendant was in this case discharged, (but interrogatories being filed) was ordered to answer in four days or stand committed.

P. 1700, cor. M. R.
Dunby v. Lawson,
Prec. in Ch. 110.
1 Eq. Abr. 351. pl. 3. 4.
Vide Prac. Reg. 21.

6. After service of a writ of execution of a decree against a corporation, the next process is a *distingas*, and after that a *sequestration*, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *distingas*, which issues to compel them to appear; but the appearing being past, the process must go on, because the appearing being only in favour of liberty, can be of no service to a corporation which cannot be committed.

M. 1700, Canc.
Harvey v. East India Company,
Prec. in Ch. 128.
2 Vern. 395.
2 Eq. Abr. 281. pl. 2.

7. The estates of the late lord *A.* were decreed to be sold for payment of debts and legacies, and were sold accordingly. The purchaser afterwards sold off the greater part of the estate to a third person, and delivered over to him all the title deeds, so that he could not make any title to the residue; he therefore moved that the parties who had conveyed to him might execute a duplicate of the conveyance, which they refusing to do on the first motion, Lord Keeper said he looked upon it to be within the covenant for further assurance, and ordered that a duplicate should be executed and indorsed as such; but the matter being moved again by the other side the order was discharged, for the decree being once executed, the court had no more to do in it.

M. 1700, cor. Wright, C. S.
Napper v. Lord Allington,
1 Eq. Abr. 167. pl. 4.

8. When

4 O&A. 1718, cor. Parker, C.
Anon. 3 P. Wms. 379. (A.)

8. When lands are decreed, the manner of gaining possession is, first to serve the party with a writ of execution of the decree, then to have an attachment for contempt in not obeying the decree, and afterwards an injunction to deliver possession of the premises, and if that is not done to have a writ of assistance to the sheriff; but when a receiver is appointed, this being as it were the hand of the court, he will in a summary way be put in possession, and the tenants ordered to attorn to him, and a writ of assistance granted, without awarding an injunction, which is the usual preceding process.

M. 1719, in Scacc.
Jones v. Clement and another,
Bun. 50.

9. Commissioners of rebellion ought to take security from the defendants to appear, where it is upon the ordinary process of the court; but where it is upon an attachment, or contempt of an order, they ought not take any security, but have the body in court upon the return of the commission of rebellion.

26 Jan. 1722, Canc.
Stone v. Burn,
2 Eq. Abr. 221. pl. 5.
5 Vin. Abr. 452. pl. 14.

10. Contempts for acting against an order of court will be discharged where the order is erroneous.

M. 1729, Scacc.
Desborough v. Crumby,
2 Eq. Abr. 712. pl. 1.
Barn. in B. R. 212.
Bunb. 272. *nomine Debbrow v. Crombie*.

11. In this case the court agreed that sequestrators upon *mesne process* cannot take defendant's goods off the premises; for a sequestration on *mesne process* answers only to a *disfringas* at law; and as to selling them, courts of equity could not authorise sequestrators to sell goods, even upon a decree, till *Lord Stamford's* act, which makes decrees in this respect equal to judgments: and it was said at the bar, that sequestrators cannot, even now, sell but by leave of the court. The court, however, postponed the consideration of this question, and referred the irregularity complained of in this case to the deputy remembrancer.

T. 1731, cor. M. R.
Bligh v. Earl of Darley,
2 P. Wms. 621.
2 Eq. Abr. 712. pl. 7.
Vide Morrice v. Bank of England, Ca. temp. Talb. 222. *Astley v. Powis*, 1 Ves. 496. *Wharam v. Broughton*, 1 Ves. 182. but in *Hawkins v. Crook*, 3 Atk. 594. it is said that although a sequestration on *mesne process* be for non-performance of a decree.

12. Where there is a decree for a debt, and the defendant dies, such decree does not bind the legal assets descended to the heir as a judgment does.

The only way, upon a decree for a debt, to affect land, is to proceed for a contempt to a sequestration; but such sequestration abates by the death of the the party, which an extent does not.

determined by the death of the party, it is otherwise where it issues

§6. *Performance—Disobedience—Contempt.* D—e 507

13. A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. A. articulated to buy the estate of the trustees, and brought a bill to compel them to perform the contract. The trustees by their answer disclosed the matter. The court will make no new decree, but leave the former decree to be pursued.

T. 1734, cor. Tabor, C.
Amesley v. Albury,
3 P. Wms. 212.
2 Eq. Abr. 31. pl. 41.

14. Bill in the court of equity at Brecon for a legacy, which was decreed by the *Welsh* judges to be paid: defendant appealed to the Lords, who affirmed the *Welsh* decree, and ordered their decree to be executed in *Wales*. Defendant, to avoid this, fled into *England*, whereupon plaintiff brought his bill in Chancery, to which defendant demurred, for that the court had always refused to assist where a complete decree had been obtained in an inferior court. Lord Chancellor inclined to over-rule the demurrer, saying, that an original dependent decree might be had in Chancery upon such a bill, stating all the proceedings in *Wales*, &c. but his lordship reserved the consideration of the demurrer till the hearing of the cause.

M. 1737, cor. Hardw. C.
Morgan v. —, 1 Atk. 402.

15. A decree served on a peer needs no letter missive.

P. 1739, Scaec.
Mackenzie v. Marg. of Pervis,
2 Com. Rep. 674.
1543. Com. Dig. tit. Chancery

Vide 3 Black. Com. 445. 2 Vent. 342. Selden's works, 6 vol. 1543. (B. 1).

16. Costs in equity are entirely in the discretion of the court; but where the court think it will accelerate the decree, they will postpone the consideration of costs till the cause comes back from the Master, though there are sufficient grounds for decreeing them at the hearing.

14 Jan. 1740, cor. Hardw. C.
Scarborough v. Burton,
2 Atk. 111. Barn. 255.

A plaintiff may apply to the court for costs, where a defendant gives unnecessary trouble in carrying a decree into execution.

17. Motion for a writ of assistance to the sheriff. Defendant had been served with a writ of execution of the decree, and there had been an attachment. *Per curiam*—There must be an injunction to defendant to deliver possession, the decree being for possession, and then a writ of assistance to the sheriff, commanding him to be aiding to put the plaintiff in possession.

28 Nov. 1744, cor. Hardw. C.
Stribley v. Hawke, 3 Atk. 275.
Vide *Roberdeau v. Rous*, 1 Atk.
543. Penn. v. Ld. Baltimore,
1 Vef. 454. Fonbl. Treat. of
Eq. 31.

18. Where a person attends a cause, to which he is a defendant, and had notice of the decree, by

12 Aug. 1747, cor. Hardw. C.
Skip v. Harwood,
3 Atk. 565.

Vide Anot. 3 Atk. 567. Pen-
gree v. Jones, 2 Bro. Ch. Ca.
141.

21 Dec. 1747, cor. Hardw. C.
Hawkins v. Crook, 3 Atk. 594.
Vide Bligh v. Darnley, 1 P.
Wms. 622. *Wharam v. Brough-*
ton, 1 Vesf. 182. *White v. Hay-*
ward, 2 Vesf. 464.

17 Dec. 1748, cor. Hardw. C.
Wharam v. Broughton,
1 Vesf. 182.

P. 1749, cor. Hardw. C.
Wise v. Sipp, 1 Vesf. 245.

2 June 1749, cor. Hardw. C.
Ex parte Wbitchurch,
1 Atk. 55—59.

(a) It appears the petitioner
voluntarily surrendered himself to
the tipstaff.

(b) Case of Sir — Cecil et
al. of the town of Nottingham,
12 Mod. 348.

(c) *Vide Parker v. Sir Wm.*
Moore, 6 Mod. 95. *Carth.* 504.
2 Salk. 626. but in *R. v. Myers*,
Term Rep. 266. this cited case
was said to have been over-ruled
by subsequent cases.

14 Nov. 1749, cor. Hardw. C.
Horn v. Horn, Ambler. 79.
1 Eq. Abr. 75.

by being present when it was pronounced; if he
does any act in contravention to it, he is guilty of
a contempt, and liable to be committed to the
Fleet.

19. Where a sequestration issues as a mesne
process, it falls with the death of the person; but,
if for non-performance of a decree, the death of
the party doth not determine it.

20. A sequestration to compel the performance
of a decree abates by the death of the plaintiff.

21. In this case it was objected, that on a bill
to carry a former decree into execution, the court
can only do that, and not vary; and the general
rule is so. But there are many instances wherein
the court has considered the directions, and whe-
ther there was any mistake. Lord *Cowper* has
done it, and it may be done in this case, especially
as between new parties.

22. Petitioner was arrested on a *Sunday* by Lord
Chancellor's tipstaff, under his lordship's warrant,
for a contempt in disobeying an order. He now
prayed to be discharged, insisting that his arrest
and commitment were illegal, and contrary to the
statute of 29 Car. 2. c. 7. s. 6. Lord Chancellor
at first doubted, but afterwards thought the arrest
lawful, and not within the statute (a). The order
in this case was different from any process directed
to a sheriff, for it was that *the party should stand*
committed. All the books of practice (though per-
haps not of authority) agree in laying it down,
that a party is deemed a prisoner from the time
of pronouncing the order; and it is so considered,
especially if the party be in court at the time.
Lord *Holt* was of opinion, that a man might be
taken on a process for contempt on a *Sunday*, be-
cause a contempt was in nature of a breach of the
peace, and an exception out of the statute (b). It
has been held also (c) that a man may be taken on
a *Sunday* on an attachment for non-performance
of an award, and surely non-performance of an
order in Chancery is equally a breach of the peace.
Lord Chancellor would not discharge the petitioner
in this case, for he might bring a *habeas corpus* or
an action for false imprisonment.

23. Where there is an equitable demand, and
the party is taken in execution on a decree, Chan-
cery

§ 6. Performance—Disobedience—Contempt.

D—e 509

every will, notwithstanding, issue process against the lands and effects, for the body being detained for contempt is not a satisfaction.

24. Decree for debt and costs. An attachment issued for the debt alone before the taxation of costs, and another for the costs when taxed. They were both held good.

H. 1794, in Scacc.
Fraser v. Toborn,
2 *Asstr.* 380. 413.

See more tit. *Contempt, Process, Sequestration.*

Of Decrees on the Statute of Charitable Uses,
vide Charity.

As to the Evidence necessary to obtain a Decree,
and the Cases in which a Decree can be ad-
mitted as Evidence, *vide Evidence.*

In what Cases a former Decree can be pleaded,
vide Plea.

Deeds.

D—e

Rules for the Construction of Deeds.

I. *THE construction of deeds should be favourable, and as near to the minds and apparent intents of the parties as may be and the law will permit.* Touchst. 86. *for benigne sunt faciendæ interpretationes chartarum propter simplicitatem Laicorum*, Co. Lit. 36. *Et verba intentioni non è contra debent inservire*, 8 Co. 94. Co. Lit. 313. Lit. Sec. 163. Plow. 154. 160.

II. *The construction of a deed should be reasonable and according to an indifferent and equal understanding.* Touchst. 86. Plowd. 161. 16 H. 8. 10 Dy. 15. Fitz. Barre, 237. Bro. Don. 14. 17 Ed. 3. 7. 46 Ed. 3. 17.

III. *Too much regard should not be had to the native and proper definition, significations, and acceptance of words and sentences, so as to pervert the simple intentions of the parties (a).* Mala grammatica non vitiat chartam, 6 Co. 39. Falsa orthographia non vitiat concessionem, Touchst. 87. Plowd. 134. 154. 170. Dy. 46. Co. Lit. 223. 146. 217. Co. 9. 48. 10. 143.

(a) *Vide Smith v. Packhurst*,
3 Atk. 136.

IV. The

IV. *The construction should be made upon the entire deed, and that one part of it may help to expound another, and that every word (if it may be) may take effect, and none be rejected, and so that all the parts agree without discordance.* Ex antecedentibus et consequentibus est optima interpretatio. 2 Inst. 317. for Turpis est pars quæ cum suo toto non convenit, Plow. 160, 161. Maledicta expositio quæ corrumpit textum, 4 Co. 35. Touchst. 87.

(b) *Vide* Butler v. Duncomb, 1 P. Wms. 457.

* Smith ex dem. Dormer v. Packhurst, 3 Atk. 136.

V. *The construction should be such as that the whole deed and every part of it may take effect, and as much effect as may be to the purpose for which it was made (b), and so as that when the deed cannot take effect according to the letter, it be construed to take some effect or other.* Verba debent intelligi cum effectu. Et benignè faciendæ sunt interpretationes ut res magis valeat quam pereat *, Touchst. 87. Lit. Sec. 283. Finche's Leg, 60. Plowd. 160. 154.

(c) This rule must be understood with a restriction, for a distinction should be made between an indenture and a deed-poll; the latter is executed by the grantor alone, and the words are his only, but in an indenture executed by both parties, the words are the words of both. Plowd. 174.—This rule is never to be relied upon but where the other rules of exposition fail, and, from its strictness and rigor, is the last to be resorted to. Bac. Elem. Reg. 3.

VII. *If there be two clauses or parts of a deed repugnant to each other, the first part shall be received and the latter rejected, except where there be some special reason to the contrary; and herein a deed differs from a will, for if there be two repugnant clauses in a will, the first shall be rejected and the latter received (a).* Touchst. 88. Bishop of Ely's case, 4 Eliz.

(d) This is owing to the different nature of the two instruments; for the first deed and the last will are most available in law. Hard. 94. 1 Vern. 30.—As to the diversity of opinions on the operation of repugnant clauses in a will, and the authorities respecting them, vide Co. Litt. 13 edit. 112. b. note 1. Plowd. last edit. marg. notes 541.—As to the exposition of deeds where a repugnancy appears in the words of them, Bac. Abr. Grants, 1.

VIII. *That which is generally spoken should be generally understood, unless it be qualified by some special subsequent words as it may be.* Touchst. 88. Co. Lit. 42.

IX. *If the words of a deed have a double intentment, and the one stands with law and the other is against*

against law, it shall be taken in that sense which is agreeable to law. Touchst. 88. 9 Ed. 4. 4.

X. Things doubtfully set down shall be applied to him to whom they properly belong. Touchst. 88. Co. 9. 10. 48. 143.

XI. Such a construction shall be made of abbreviations, as that the deed may not lose its force. Touchst. 88. Fitz. Grant, 41. Plow. 317. Co. 5. 12. 22 Aff. pl. 61. Perk. Sec. 110.

Most of the foregoing rules run through all the cases of deeds of grant; for the exposition of which in their several parts, and how the words and sentences therein shall be taken, see Touchst. 89—100.—Further, as to rules for the construction of deeds and wills, vide Plowd. 160. Lilly's Prac. Convey. 152. Finch's Law, 58. The rules of property, evidence, and interpretation, ought to be the same both in law and equity, and both courts should adopt the best, 3 Black. Com. 434.—Courts of equity are bound, as to property, by positive rules and general maxims, as much as courts of law. Vide 5 Burr. 1108. where the rules of construction are fully discussed.—The construction does not vary with the court.—It is the different subject of the limitation which occasions the alteration in the construction of it, and will occasion the same difference even in the same court. Vide Fearn on Cont. Rem. 3d edit. 93.—In the construction of ancient grants and deeds there is no better way of construing them than by usage, and contemporanea expositio is the best way to go by. Attorney-General v. Parker, or, Price v. Doughty, 3 Atk. 577.

Rules with respect to Things granted by Deed.

I. When any thing is granted, all the means to attain it and all the fruits and effects of it are granted also, and shall pass INCLUSIVE, together with the thing, by the grant of the thing itself, without the words CUM PERTINENTIIS, or any such like words. Quicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit, Touchst. 89.

F. N. B. 183. 11 Co. 52. Finch's Law, 63.

II. The incident, accessory, appendant, and regardant shall pass by the grant of the principal without the words cum pertinentiis, but not è converso, for the principal does not pass by the grant of the incident, &c. Accessorium non ducit, sed sequitur suum principale. Touchst. 89. Co. Lit. 152. Lit. Sec. 229. 572. Co. 4. 86, 87. 8 H. 7. 4. Bro. Grant, 86. 144. 43 Ed. 3. 22. Co. 10. 64. Co. Lit. 307. or appendant to a thing in reversion. Touchst. 89. 38 H. 6. 38. Co. 11. 47. 50. Plowd. 103. Bro. Grant. 66. 129. Co. 1. 7. 28. When an advowson shall be appendant or in gross, vide Com. Dig. Advowson (B), and further what shall be deemed to pass as appendant, appurtenant, or incident. Vide Bac. Abr. Grants, I. 24.—If land be appendant to an office, a grant of the office with the appurtenances it will pass the land without livery of seisin. And if an office be appendant to land, there, by the grant of the one the other will pass. Touchst. 90.

A reversion may be parcel of or appendant to a thing in possession, and pass by the grant of it; but a possession cannot be parcel

III. That which is parcel or of the essence of a thing, though it be actually severed from it at the time of the grant, shall pass by the grant of the thing itself. Touchst. 90. 14 H. 8. 25. Co. Lit. 11. 50.

IV. By

(a) Land being *nomen generalissimum*, yet nothing will pass which does not fall with the utmost propriety under the term made use of.

IV. By the grant of the land or ground itself, all that is *supra*, as houses, trees, &c. is granted for *cujus est solum ejus est usque ad cœlum*. Also all that is *infra*, as mines, earth, quarries, clay, &c. (a). And by the grant of a house the land whereon it stands will pass. Touchst. 90. 14 H. 8. 1 Co. Lit. 4. 12 H. 7. 25.

V. When any matter of interest or profit is granted, the grant shall be taken largely; but when any matter of ease or pleasure is granted, the grant shall be taken strictly. Touchst. 90.

VI. When a man grants all his lands or all his goods, this grant passes not only what he is sole seised or possessed of, but also what he is seised or possessed of jointly with another (a). *Et sic è converso*. Touchst. 90. Plowd. 289. 19 H. 6. 4.

(a) As an obligation wherein he is joint obligee, so also those things pass of which a man is possessed in right of another, as a term for years which he has in right of his wife, or goods which he has as executor. Roll. Abr. 53. Grants, X. 1 Leon. 263.

VII. Some words in deeds are large, and have a general extent, and some have a proper and particular application: the former sort may contain the latter, as *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, and it is in the election of the party to whom the deed is made to use it to which of these purposes he will. Touchst. 91. Co. Lit. 301. Lit. Sec. 543, 544.

Obs. Among words whereby things do pass, some are collective, compound, or general, comprehending many things, as *hereditaments*, *lands*, *tenements*, *honors*, *isles*, *villages*, and the like, including lands of several sorts and qualities; and some words are simple or particular, as *meadow*, *pasture*, *wood*, *moor*, and the like. For an exposition of the terms whereby things are granted, vide Touchst. 91 to 100. and the several references there made.

Of the Exception.

The exception is always taken most in favor of the feoffee, lessee, &c. and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words in a grant will be taken by the same words in an exception. And it is another rule, that when any thing is excepted, all things that are depending on it and necessary for the obtaining of it are excepted also. Touchst. 100. Co. 10. 106. 14 H. 8. 2. 11. 52.

Of the *Habendum*.

The habendum, as all other parts of a deed, shall generally be taken most strongly against the grantor and most in advantage of the grantee, yet it shall be construed as near the intent of the parties as may be. Touchst. 101. and the several cases there referred to.

SEC. I. Of the Construction and Operation of Deeds, Conveyances, and Assurances.

1. IN this case it was allowed, although a conveyance be made purporting a feoffment, yet nevertheless it may operate as a covenant to stand seised.

P. 1687, Canc.
Thompson v. Atfield, 1 Vern. 40.
What shall amount to a covenant to stand seised, *vide ante*, tit. Covenant, s. 2.

2. A widower (having several children) by settlement made a provision for his younger children sons and daughters, and then he married a second time, and had children. Held, that the children of the second marriage should be included within the words *younger children*, and should have an equal share with the children of the first marriage.

M. 1685, cor. Jeffries, C.
Bratwaite v. Bratwaite,
1 Vern. 334.
See this case more at large, *post*.
tit. Portions.

3. The estate of A. was decreed to be sold for payment of debts and legacies, and that all parties interested should join in the sale. J. S. was the purchaser of the whole, being 2000*l. per annum*, and a conveyance was made to him, with a covenant for further assurance. J. S. sold off 1600*l. per annum*, and delivered over the title-deeds to the purchaser, so that he was left without a title to the remaining 400*l. per annum*; he therefore moved, that the parties who conveyed to him should execute a duplicate deed, which the court ordered, considering it within the covenant for further assurance, and directed it to be indorsed as a duplicate; but the court being moved again, the order was discharged, for that the decree being once executed the court had no more to do with it.

M. 1700, Canc.
Napper v. Lord Allington,
1 Eq. Abr. 166. pl. 4.

4. There is a great difference between a will and a conveyance at common law, for the law has appointed proper words to be made use of in limitations.

P. 1705, B. R. per Holt, C. J.
In casu Idle v. Cook,
1 P. Wms. 77.
2 Eq. Abr. 299. pl. 12.

mitations of estates in deeds, as the word (heir) to carry a *fee-simple*, and no other word *tantamount* or *equivalent* will be admitted; whereas in a will it is otherwise, for that is a new conveyance by force of the statute of 32 H. 8. which says, *that it shall be lawful for a man to dispose of his lands by will, at his will and pleasure*: and this is the reason why a devise to a man *in perpetuum* passes a fee simple, at the same time that these words in a deed give only an estate for life.

14 Feb. 1706, Dom. Prec.
Eyton v. Eyton & Un. and another,
 1 Bro. P. C. 156.
 2 Vern. 380.
 1 Eq. Abr. 169. pl. 2.

M. 1707, cor. Cowper, C.
Young v. Cottle, 1 P. Wms. 101.

5. A fine and recovery mentions only *two messuages*, but the deed of uses, besides mentioning these two messuages, has the general words of *all other the messuages, lands, tenements, and hereditaments* of the said B. Held, that the deed and not the fine shall be the measure of what passes.

6. The Archbishop of Canterbury in 1673 granted the office of registrar to *Cottle, Exton, and Sheldon* for their lives. *Sheldon* died, and *Exton* by deed declared himself a trustee for *Cottle*, and covenanted to depute *Cottle*, or as he should direct or appoint. *Cottle* by deed in 1679 appointed *Hoar* to be his deputy, and in case of *Hoar's* death, such person as his executors should appoint. *Cottle* then made a farther appointment as to the profits of the office. Under this appointment the defendant became well entitled to the whole of the profits, but old *Cottle*, by a subsequent deed made in 1681 made different appointments, under which defendant was entitled only to a moiety of the profits, and *Hoar* being dead, *Cottle* appointed another deputy. Defendant for many years accepted his share under the second deed, and did not claim under the first, it having been concealed from him by old *Cottle's* widow. The question was, Which of these deeds should prevail? *Per Lord Chancellor*—The first deed was only an authority, and therefore clearly countermandable by the second: it no more than if one should appoint his bailiff to pay one moiety of the profits of his manor to A. and the other moiety to B. This is countermandable at pleasure, and by the same reason that old *Cottle* could appoint another deputy after *Hoar's* death manage the office, so could he make another disposition of the office. Decreed, that the first deed should be delivered up, and that the second should prevail.

§ 1. *Construction and Operation.*

D—e 515

P. 1709, *Canc.*
Manners v. Banning,
MS. Rep. 2 Eq. Abr. 282. pl. 1.

7. Lady Grace seised in fee of certain lands, conveyed the same to her father in fee, but he was to re-convey these lands, together with others of his own of twice the value, to trustees in fee, in trust for the lady for her life, for her separate use, no husband to intermeddle therewith, or receive the profits thereof, and afterwards to every of her sons in tail, &c. with a power of revocation. *Per Lord Chancellor*—A deed made by a child to a father generally lies under the suspicion of a trust and a fraud, by reason of the authority the father hath over his child; but neither law nor equity say it is void: and this court will support it, when done upon a good consideration. Lady Grace was the darling of her father, and he prevailed upon her to convey the lands to him, in order to settle them upon her in this prudent manner, with which she complied. Now such obedience cannot produce effects to her prejudice. She so far obliged him in it, that he settled other lands of twice the value upon her. This was upon a bill exhibited by the devisee against the remainder-men, alleging that the deed made by the father was fraudulent.

T. 1713, cor. Harcourt, C.
Kentish v. Newman,
 1 P. Wms. 234.

8. Articles made before marriage were in this case construed against the words, for the sake of the intent, where the wife's portion was to be laid out in land, to be settled on husband and wife and the heirs of their bodies; and if not laid out in land during their joint lives and the wife should die first, that the money should go to her brother and sister. The wife died leaving issue, and the money was not laid out in a purchase; yet decreed, that the issue and not the wife's brother and sister shall have it, equity supplying the words, *if the wife die without issue (a)*.

(a) *Vide Targus v. Paget*,
 2 Vef. 194. et vide *Spalding v.*

Spalding, Cro. Car. 185. cited in 1 Ventr. 230. and in *Hewit v. Ireland*, 1 P. Wms. 427.

9. A. being possessed of several messuages for a term of 999 years, upon valuable considerations, by lease and release, grants, bargains, sells, and demises the same to trustees and their heirs, to the use of himself and his wife for their lives, and the life of the survivor of them, remainder to the heirs of the wife, and covenants that he was seised in fee. Then the wife dies without issue, having made a writing in the nature of a will, and thereby devised the premises to settled on her to B. and his heirs. It was insisted that nothing at all passed by the settlement, for it

H. 1717, cor. Cowper, C.
Marshall v. Frank & Ux.
Gilt. Eq. Rep. 143.
 2 Eq. Abr. 282. pl. 2.
Prac. in Ch. 480.

being only a term in gross, no use passed to the trustees by the statute of 27 H. 8. *which only raises the use when a person is seised*: that by the lease for a year (*which was only a bargain and sale*) no use passed, and there was no attornment to vest it as a reversion; and the release being to enure upon it by way of enlargement of the estate, if nothing passed by the lease, if no possession was transferred by that, then there was no estate whereon the release could operate: that the estate settled on the wife being only a term for years, the limitation to her heirs was void; and admitting it had been good, yet she was under coverture, and had no power to make a will; *ergo*, the devise to B. thereof was void; and then a release by her heir at law to B. and his heir could have no operation, and so the term must go to A. the husband. Lord Chancellor was of opinion, that though the settlement could not operate as a lease and release, yet A. the husband being in possession, and there being the word granted in the release, it took effect as a grant or assignment of his whole interest at common law: and though it could not go to the heirs of his wife, yet his intention being plain to exclude himself from the whole interest of that estate, he should not be afterwards admitted to derogate from it, and therefore should vest in those in whom by law it ought, and should go to the wife's administrator; for as A. intended to divest himself of the whole fee, if it had been a fee, there was no reason when it appeared to be a less interest that it should not pass.

H. 1718. cor. Parker, C.
Metham v. D. of Devonshire.
 1 P. W. 530.

Note; Where there are limitations of an estate by one deed, and further limitations by another deed, they cannot be coupled together. *Moore v. Parker*, 1 Raym. 37. *Goodman v. Goodwright*, 3 Burr. 873. *Doe ex dem. Fonnereau v. Fonnereau*, Doug. 487. On these authorities the court of K. B. held they could not unite the deed with the will. *Vincent v. Stansfield*, *Habergham v. Vincent*, 5 Term Rep. 92. 4 Bro. Ch. Ca. 353

H. 1725, cor. King, C.
Thomas v. Bennett,
 2 P. W. 342.
 (a) *Bale v. Coleman*,
 1 P. W. 145.

10. Where by the directions of a will, money is to be paid by the executors as the testator by deed shall appoint, and the testator afterwards makes a deed of appointment, this deed referring to the will shall be construed as part thereof.

11. In a case of articles, the court has a much greater latitude of construction than in a case of limitations of estates. Thus in the case of (a) marriage articles to settle lands on the husband and wife for their lives, remainder to the heirs male of their bodies, it shall be understood to have been intended the first and every other son; so in this case

§ 1. *Construction and Operation.*

D—e 517

case the words *heirs of the body of the niece by her husband* shall be construed children (a), and the rather because it is said just afterwards, and to *their* heirs, whereas if there be a son of the marriage, it must be *his* heirs alone that must take; and though in case there had been only daughters, the words *their heirs* had been proper, yet in this case there are sons, and it cannot be intended that the provision was for daughters only, when not so expressed.

(a) *Vide* Loveday v. Hopkins, Amb. 273.

12. A. had a house in London, in which he lived, and household goods; he had also a house at Gosport, used by government as an hospital for invalid seamen, with a vast number of beds, sheets, and household stuff; and by marriage articles it was agreed, that his wife should have no claim on his personal estate, *except his household goods and household stuff*. This exception was held to extend only to the goods which he had in the house in which he lived, and not to such as were in the hospital made use of by government.

M. 1725, cor. King, C.
Pratt v. Jackson, 2 P. W. 302.
2 Eq. Abr. 325. pl. 29.
3 Bro. P. C. 199.
8 Vin. Abr. 280. pl. 25.

Where the meaning is uncertain the safest way is to follow the letter, and not to wander from thence, which creates the utmost uncertainty and gives a latitude for the court to make constructions perhaps never intended to be made by the parties. Dict. per Lord Ch. King in S. C.

Note; This case was reported by P. W. upon the decree of Lord King, who took the meaning to be as large as the words, particularly when in favour of a wife; and therefore his lordship decreed that the wife should have the beds, sheets, and other furniture used in the hospital; but his lordship's decree was afterwards reversed in *Domo Procer.* and the point was finally determined *ut supra*. *Vide* 3 Bro. P. C. 199. *In* Crichton v. Simes, 3 Atk. 61. *Le* Farrant v. Spencer, 1 Vez. 97.

13. The court never orders a will to be proved *in* *voce* at the hearing, as they do a deed.

H. 1730, cor. Jekyll, M. R.
Harris v. Ingledew, 3 P. W. 93.

14. A conveyance to *different* (b) uses is an effectual revocation.

June 1730, cor. King, C.
Fitzgerald v. Lord Fauconbridge,
Fitzg. Rep. 215. 2 Eq. Abr. 674. pl. 12.

(b) Without any recital of the power in the deed of revocation, MS. Rep.
Vide *post*. tit. *Power, Revocation*, S. C. more at large.

15. A deed of lands in two different counties, by way of feoffment, and livery and seisin of the lands in one county indorsed: the deed was made in 1657. Decreed, that though no livery appeared of the other lands, yet by reason of the possession, and great length of time, equity will suppose and supply it. It had been much stronger had the livery been indorsed of lands in one county in the name of both; it would have been an implication that none was of the other, since one was designed for both.

4th Nov. 1730, cor. King, C.
Jackson v. Jackson,
Set. Ca. in Cb. 81.

2 Eq. Abr. 286. pl. 4. 472. pl. 1.
Fitzgib. 1. Gilb. Rep. 146.

Fitzgib. says it was insisted, that as to the possession and length of time, the intendment endeavoured to be made out from thence can have no weight, because the same persons that enjoyed the lands under the deed, were also at law, and as such must have enjoyed them, otherwise, though there had been no such

deed; yet Lord Chancellor declared, that was he to try this matter at law, he should presume and so direct, that livery was executed as to all the lands, according to the deed, after this length of time; but however, that this court would aid a defect of this kind.

*Ms. 1733. cor. Jekyll, M. R.
Nightingale v. Earl of Ferrers,
3 P. Wms. 208.*

16. The deed of an infant is not void like that of a feme covert, but only voidable, for which reason an infant cannot plead *non est factum* to his deed as a feme covert may.

28th Jan. 1737, cor. Hardw. C.
Green v. Belchier, 1 Atk. 505.

17. In a settlement before marriage was a proviso, that if the husband and wife should die, leaving issue unprovided for, that then the trustees might enter upon the settled estate, and take the rents thereof, till they had received 200*l.* for the benefit of such unprovided children, in such manner and proportion as the husband and wife, or the survivor of them, should appoint. The wife survived, and, according to her power under the proviso, appointed the 200*l.* to her daughter the plaintiff's wife, being the only child unprovided for. A bill was brought against defendant a purchaser, to have the 200*l.* raised. Sir Joseph Jekyll, Master of the Rolls, decreed the 200*l.* and interest by way of maintenance from the death of the mother. The defendant appealed to Lord Chancellor from that part which allowed interest, but the decree at the Rolls was affirmed.

Wherever the words *to be raised by rents and profits* are used in a deed, unless there are other words to make it annual, the court have always made a liberal construction in order to obtain the end which the party intended by raising the money, and have allowed a sale (a).

(a) *Vide* Trafford v. Ashton, 1 P. Wms. 418. and Mr. Cox's note 1. Ivy v. Gilbert, 2 P. Wms. 19. n. 1. Okeden v. Okeden, 1 Atk. 550.

The appointment of the 200*l.* being in such manner and proportions as the survivor of the father and mother should think fit, not only include a power of raising it by mortgage or sale (b), but a certain determinate time for raising it; and as the settlement limits no time for payment of the 200*l.* the father or mother might have made it payable at any time.

(b) *Vide* Atkinson v. Turner, 2 Atk. 41.

It is a constant rule in equity, that where a legacy is given by a father to a child as a provision, though payable at a future day, yet the child has an immediate right to the interest of the money (c); otherwise, if the legatee be a stranger to the testator.

(c) *Vide* Heath v. Perry, 3 Atk. 102. (n.)

2d Aug. 1739, cor. Hardw. C.
Stapleton v. Stapleton, 1 Atk. 8.

18. Where a court of law or equity finds that the general and substantial intent of the parties was, that an estate should pass, they will construe deeds in support of that intention different from the formal nature of those deeds themselves, as a feoffment

ment to serve the intention of the parties shall operate as a covenant to stand seised (a).

(a) *Crossing v. Scudamore*,
1 Vent. 137.

19. The heir at law does not want an express intention to take by a will, though it is otherwise to take by a deed.

12 Mar. 1740, cor. Hardw. C.
Lloyd and Johnson v. Spillett and others, 2 Atk. 151.

20. *J. S.* had a rent-charge of 166 l. per annum granted to him and his assigns for three lives. He and his lady mortgaged the same to *A.*, his executors, administrators, and assigns, *habendum* to him, his heirs, and assigns, during the three lives for which this rent was originally granted, upon this special trust, that *A.*, his executors, administrators, and assigns, shall enjoy 100 l. per annum out of it to their own proper use, till the mortgage money was satisfied, if the three lives should last so long. *A.* made his will, and appointed plaintiff his executor; but to this will there were no subscribing witnesses. The bill was brought by the plaintiff against *A.*'s heir at law and others, to have the benefit of so much of the rent-charge as *A.* the mortgagee was entitled to. His Honor (after time taken to consider of it) said, there were two questions for his consideration: 1st, what sort of a legal estate *A.* had in this rent-charge; viz. Whether it was such an estate as would go to his heirs or his executors for the three lives? And supposing the legal estate would go to his heirs, the next question is, Whether the trust of it does not belong to his executors? What makes this a very particular case is, that this is an estate *pur auter vie*; and the first point of the case is so new, that was it not for the second, his Honor would have thought it proper to have had the opinion of a court of law upon it; for, though the rules are fully established how far the *habendum* of a deed shall vary and explain the premises of it, yet, when the present case comes to be applied to these rules, great difficulty arises; and he said, he could not find a single authority which would come up to the first point of the present case. That the general rules are that the office of the *habendum* is to explain, limit, and declare the *quantum* of the estate which is to pass by the deed. It has never been disputed but that it will carry the limitation of the estate further than the premises of the deed did. If a man gives an estate to *A.* for life, *habendum* to him and his heirs, a fee-simple clearly passes. On the other

P. 1740, cor. M. R.
Anon. 2 Eq. Abr. 610. pl. 1.
from a MS. Rep.
Kendal v. Mickfield, Barnard.
S. C. in totid. verbis.

hand it is clear, that the *habendum* never abridges the estate granted by the premises of the deed. It may vary and alter it, as if an estate be granted to *A.* and *B.*, *habendum* to *A.* for life, the remainder to *B.*; the premises of the deed in that case will be controuled by the *habendum*. So if an estate is granted to *A.* and to the heirs of his body, *habendum* to him and his heirs, this is a fee simple. Some books say, that it is only an estate tail, with a remainder in fee; but his Honor said, it is difficult to maintain that opinion; and he thought it not law. That so far the rules relating to an *habendum* were plain and clear. The particular nature of the present case is such, that a grant of this kind to a man and his executors is the same as a grant to a man and his heirs; and in both these cases the heirs and executors do not take as representatives to the party, but as special occupants; and therefore it has been held, that if lands are granted to *A.* and his heirs for three lives, he may grant it to another and his executors for those lives. So if granted to *A.* and his executors for three lives, he may grant it to another and his heirs during those lives; from whence it follows, that if one of these limitations is in the premises of the deed and the other in the *habendum*, the *habendum* shall take place; as if the premises of the deed in the grant of the estate *pur auter vie* is to *A.* and his executors during the life of *B.*, *habendum* to *A.* and his heirs during that life, the heirs in that case shall have the benefit of that estate; so if the grant of such estate is to *A.* and his heirs during the life in being, *habendum* to *A.* and his executors during that life, the executors shall have the benefit of it, because the *habendum* does not attempt to give a less or larger estate than contained in the premises, but is merely explanatory; and, though before the statute of frauds and perjuries no grant of a rent *pur auter vie* could be good any longer than the party (*viz.* the grantee) himself lived, because a rent lay not in occupancy, so that it was certain that there could not be a general occupancy of it, nor could the common law admit, in that case, of a special occupancy. But his Honor was of opinion that such rent was within the statute of frauds, &c. that statute intending to make a general alteration with regard to all sorts of estates that were granted *pur auter vie*; and a rent-charge is as much within the intention of the act as any other sort of inheritance.

The

The difficulty then concerning the *rent-charge* may be quite laid aside; and then the matter concerning the *legal estate* depends upon the *habendum*, which his Honor thought ought to take place for the reasons before mentioned, and consequently that the *legal estate* in this *rent* belonged to the *heir at law*. But then his Honor was of opinion, that within the meaning of the *deed* of trust, the plaintiff, *executor* of *A.*, is entitled to it, it being *expressly declared by the deed* that the mortgage was made upon the *special trust*, that *A.*, his *executors*, *administrators*, and *assigns*, should enjoy the benefit of 100 *l. per annum*, part of the *rent-charge*, till the mortgage was satisfied, if the three lives continued so long. The only thing which made any difficulty in this part of the case was, that it is pretty hard to conceive how a *man* and his *heirs* should be *trustees* for a man and his *executors*, but that this is the case of every mortgage *in fee*. And his Honor decreed accordingly.

21. *E. B.*, termor for 59 years, by settlement conveyed the term to trustees, in trust to permit his wife *Grace* to receive the rents during the term, if she so long live; and after her decease to permit him to enjoy the rents during his life; and after his decease in trust for the *heirs of the body* of *Grace* by *E. B.*, and to their *executors*, *administrators*, and *assigns*, for the remainder of the term; and for default of such issue remainder to *H. H.* for her life*; and after her decease in trust for her two sons *W.* and *E.*, their *executors*, and *administrators*, during the term. *E. B.* died, never having had any issue, and *Grace* his wife survived him. Lord *Hardwicke* held, that the whole term was not vested in *Grace*, and that the words *HEIRS OF THE BODY* were not words of limitation but purchase, and directed the lease to be deposited in court for the benefit of all parties (a). His lordship said, that the general run of cases makes this plain, that notwithstanding they sound like words of limitation, yet,

18 Nov. 1740, cor. *Hardw. C.*
Hodgson & al. v. Buffey,
2 *Atk.* 89.
Barn. Ch. Rep. 195.
9 *Mod.* 236. *nomine* *Hodjell v.*
Buffell, 2 *Ves.* 236. 652. 660.
S. C. cited.

* In 9 *Mod.* 236. it is said this is a good limitation over to *C.*; and Mr. Leach, the editor of the 5th edition, refers to *Brooks v. Taylor*, *Mos.* 188. *Stephens v. Stephens*, *Ca. temp. Talb.* 218. *Sheffield v. Lord Orrery*, 3 *Atk.* 287. *Pelham v. Gregory*, 5 *Bro. P. C.* 435. *Fonnereau v. Fonnereau*, *Dougl.* 470. *Marsh v. Marsh*, 1 *Bro. Ch. Ca.* 293. *Knight v. Ellis*, 2 *Bro. Ch. Ca.* 570. *Hockley v. Mawbey*, 3 *Bro. Ch. Ca.* 82. *Fearne Cont. Rem.* 407.

(a) The general rule with respect to terms of years (and the same rule applies to other personal estates, see *Beauclerk v. Dormer*, 2 *Atk.* 308) seems to be that, whenever an estate in a term of years is limited to a person, which limitation, if applied to *freehold property*, would create an *estate-tail*, and a remainder is thereon given after a *general failure* of issue or heirs of the body, the whole vests in the first taker, and the remainder over is void. *V. de Web v. Web*, 1 *P. Wms.* 132. *Burford v. Lee*, 2 *Freem.* 210. *Ferreys v. Robertson*, *Bunb.* 301. *Saltern v. Saltern*, 2 *Atk.* 176. *Exel v. Wallace*, 2 *Ves.* 120. *Garth v. Baldwin*, 2 *Ves.* 646. *Pelham v. Gregory*, 5 *Bro. P. C.* 435. *Doe v. Lyde*, 1 *Term Rep.* 593. 596. But if there be any clause or restriction whereby it plainly appears that the words *heirs of the body* or *issue* were intended as words of purchase (as in the principal case, as in *Clare v. Clare*, *Ca. temp. Talb.* 21. *Withers v. Algood*, 1 *Ves.* 150. *Sands v. Dixwell*, 2 *Ves.* 652. *Doe v. Lyde*, 1 *Term Rep.* 593. 596. *Knight v. Ellis*, 2 *Bro. Ch. Ca.* 570.)

upon
same rule applies to other personal estates, see *Beauclerk v. Dormer*, 2 *Atk.* 308) seems to be that, whenever an estate in a term of years is limited to a person, which limitation, if applied to *freehold property*, would create an *estate-tail*, and a remainder is thereon given after a *general failure* of issue or heirs of the body, the whole vests in the first taker, and the remainder over is void. *V. de Web v. Web*, 1 *P. Wms.* 132. *Burford v. Lee*, 2 *Freem.* 210. *Ferreys v. Robertson*, *Bunb.* 301. *Saltern v. Saltern*, 2 *Atk.* 176. *Exel v. Wallace*, 2 *Ves.* 120. *Garth v. Baldwin*, 2 *Ves.* 646. *Pelham v. Gregory*, 5 *Bro. P. C.* 435. *Doe v. Lyde*, 1 *Term Rep.* 593. 596. But if there be any clause or restriction whereby it plainly appears that the words *heirs of the body* or *issue* were intended as words of purchase (as in the principal case, as in *Clare v. Clare*, *Ca. temp. Talb.* 21. *Withers v. Algood*, 1 *Ves.* 150. *Sands v. Dixwell*, 2 *Ves.* 652. *Doe v. Lyde*, 1 *Term Rep.* 593. 596. *Knight v. Ellis*, 2 *Bro. Ch. Ca.* 570.)

(b) *Vide* Archer's case, 1 Co. 63. which was a devise to the next heir male of A. and the heirs of the body of such heir male.

(c) Raym. 278. 302. 315. 2 Lev. 223. Pollexf. 582. 2 Jo. 314. 2 Show. 6. 1 Freem. 462.

(d) 2 Vern. 43. 195.

* It was said by Lord Hardwicke, in Theobridge v. Kilburn, 2 Vef. 237. that this affirmation was against the opinion of a great majority of the judges, and in Garth v. Baldwin, 2 Vef. 660. his lordship added, that no peer in the House was in the profession of the law.

(e) 2 Vern. 362. Prec. in Ch. 96. 2 Freem. 228.

(f) 1 P. Wms. 132.

(g) 3 Vin. Abr. 222.

upon circumstances, and the intention of the parties, they may be construed words of purchase, and descriptive of the person who is to take (b). The case of *Lisle v. Grey* (c) goes further. It was there held, that the words *heirs of the body* coming after the limitations to the first, second, third, and fourth sons, were words of purchase. Words of limitation are not properly used on terms for years, and therefore it is not to be wondered at that such construction should be found in so many cases where words of limitation are made use of in terms for years. In *Peacock v. Spooner* (d) it was held, that the words *heirs of the body* were words of purchase, and that decree was affirmed by the Lords*. His lordship said there were other cases on the same question, viz. *Daferne v. Goodman* (e), *Web v. Web* (f), and *Dunn v. Merrifield*, or *Dunn v. Meyrick* (g), the last of which cases his lordship said was not to be relied on as any authority. All the cases mentioned on trusts for terms for years are grounded upon the manifest and apparent intention of the parties. An objection has been taken that such constructions have been upon settlements or wills only, where the intention of the party always prevails; but the case of *Lisle v. Grey* is a full answer to that objection, for there was a settling

Ca. 570.) or if dying without issue is restrained to the death of the tenant for life, whereby the remainder over can take effect as an *executory devise* (*vide* Read v. Snell, 2 Atk. 642. 646. Lampley v. Blower, 3 Atk. 356. 398. Theobridge v. Kilburn, 2 Vef. 233. 236. 238. Attorney-General v. Bailey, 2 Bro. Ch. Ca. 553.); in either case the words *heirs of the body* or *issue* will operate as words of purchase. Indeed the court of Chancery seems willing to collect any circumstances which may restrain the generality of the words *dying without issue* to a dying without issue living at the death of the tenant for life. Nichols v. Skinner, Prec. in Ch. 528. Target v. Gaunt, 1 P. Wms. 432. Hughes v. Sayer, 1 P. Wms. 534. Pinbury v. Elkin, 1 P. Wms. 563. Forth v. Chapman, 1 P. Wms. 663. Atkinson v. Hutchinson, 3 P. Wms. 258. Sheffield v. Lord Orrery, 3 Atk. 282. Goodtitle v. Pigden, 2 Term Rep. 720. Some cases even go so far as to say that the expression *dying without issue* will of itself imply a dying without issue living at the time of the person's decease. *Vide* Nicholls v. Hooper, 1 P. Wms. 199. Target v. Gaunt, 1 P. Wms. 432. Pinbury v. Elkin, 1 P. Wms. 565. Pleydel v. Pleydel, 1 P. Wms. 748. But the modern cases deny such a construction on those words *ex vi termini*. *Vide* Beauchamp v. Dormer, 2 Atk. 313, 314. Saltern v. Saltern, 2 Atk. 376. Stafford v. Bulkley, 2 Vef. 181. Attorney-General v. Hird, 1 Bro. Ch. Ca. 170. Bigg v. Bensley, 1 Bro. Ch. Ca. 188. Glover v. Strothoff, 2 Bro. Ch. Ca. 33.

It is observable, that if a term be limited to A. for life, remainder to his issue, the subsequent word will not enlarge the express estate for life, but upon the death of A. the whole will vest in his issue. *Vide* Warman v. Seaman, Finch. Ch. Rep. 279. Clare v. Clare, Ca. temp. Talb. 21. 2 Atk. 91. But where a term is limited to A. for life, and if he die without issue remainder over, Lord Thurlow both in the case of Attorney-General v. Bayley, 2 Bro. Ch. Ca. 558. and that of Knight v. Ellis, ib. 578. was of opinion, that as the subsequent words, if applied to a freehold, would enlarge the estate for life into an estate-tail by implication; so in respect to real and personal chattels it would vest the absolute property in A. The reason of this distinction between these two cases is well explained by Lord Thurlow in the places above noticed. And the reason why the remainder in the first instance vests by purchase when the same limitation is applied to a freehold would create an estate-tail, (King v. Melling, 2 Lev. 58.) is given by Lord Talbot in Clare v. Clare, above cited.—Note; if in the above instance the remainder had been limited to the heirs of the body of A. the whole would have vested in A. *Vide* Web v. Web, Theobridge v. Kilburn, Garth v. Baldwin, and other cases cited *supra*.

of lands by J. L. who was seised in fee in his name and blood, and it is the intention of the parties appearing on the deed which governs the court in constructions. In cases of marriage settlements the court will make a favourable exposition of words to support the intention of the parties; and even in voluntary settlements, if the words lead more strongly to the one construction than to the other, it must likewise prevail. The principal case is more strong to this purpose than any of the cited cases, for it will be the same here upon the words *if she shall so long live*, as if it had been expressly given her for life only (a). It was allowed at the bar, even in case of a freehold, that if the words *for life only* had been inserted, it must have put it out of doubt, notwithstanding heirs of the body had followed. So here, *if she shall so long live* is an affirmative, implying a negative at the same time, that if she did not live so long, the remainder of the term shall go over to the plaintiffs. The reason the words *heirs of the body* vest an estate-tail in the first taker, either in the limitation of a freehold or upon a term, is, that it includes issue in infinitum. The second thing relied upon for the defendant, is, the limitation over being too remote (b). Lord Chancellor would not consider the cases cited, whether a limitation over after a tail in contingency is good where the contingency never happened or vested: his lordship said, that objection of the defendant would not hold, for the construction differs from all the cited cases. Lord Chancellor further said, that if the words *heirs of the body of Grace* are words of purchase, there is no limitation in tail, and that it is the same as if the limitation had run to the second, third, and fourth sons; or if no son, then to daughters, for the intention was that it should vest in some particular person, and not go in succession from heir of the body to heir of the body, and to executors, &c. (c) of the heir of the body, but it must vest in the first taker as if it had been to the first son, his executors, administrators, and assigns, for and during the residue of the term, and for want of such issue remainder to the plaintiff's heirs (1). Now the words, for want of such body should take this term, and not her executors and administrators, and amount to a declaration of the intention to vest the whole property of the term in the manner as the words are used. And the addition of the words "*their executors and administrators*" proves that it was not the party's intention that the term should go to all the heirs of the body in succession, so as to include all the heirs of the body for ever; but that it should vest in some particular person. *Per* Lord Hardwicke in S. C. as in 9 Mod. 239. — (1) The reasons here stated are also mentioned by Lord Hardwicke in Tharbridge v. Kilburn, 2 Vef. 237. and in 2 Vef. 660.

(a) *Vide* King v. Melling, 1 Vent. 214. 225.

(b) *Vide* Higgins v. Dowler, 2 Vern. 600. Clare v. Clare, 2 Ca. temp. Talb. 21. Sabberton v. Sabberton, ib. 45. 245. Stanley v. Leigh, 2 P. Wms. 636. cited for defendant.

(c) The words that make this case stronger than *Doforme v. Goodman*, or *Peacock v. Spooner*, are "*to the heirs of her body, their executors, administrators, and assigns*," which amount to a declaration that the executor and administrators of the heirs of the body are used. And the addition of the words "*their executors and administrators*" proves that it was not the party's intention that the term should go to all the heirs of the body in succession, so as to include all the heirs of the body for ever; but that it should vest in some particular person. *Per* Lord Hardwicke in S. C. as in 9 Mod. 239. — (1) The reasons here stated are also mentioned by Lord Hardwicke in Tharbridge

issue,

(a) 2 P. Wms. 28.

(b) 1 Salk. 156.

issue, will be the same as if it had been said for want of such son or such daughter; for the word *such* confines it to *such* issue as is meant by the words *heirs of the body*, and then it is not too remote a remainder, but brings it to the case of *Gore v. Gore* (a). It may be objected, that this is like the case of *Higgins v. Derby* (b), but it differs greatly, for that was an attempt to entail a chattel, and therefore construed to vest in the first son to prevent a perpetuity. Here the words *heirs of the body* must mean heir of the body living at the time of the death of *E. B.*, or born in a reasonable time after. Lord Chancellor concluded with the opinion, that the construction which arises from the words in this case, and the difference between the present and all the cited cases, make it a very plain case, and therefore his lordship declared the plaintiffs *H. H.* and her son entitled to the trust and benefit of the term (as above stated) after the decease of the defendant *Grace*, and decreed that the deed be left with the Master.

14 Feb. 1742, Dom. Proc.
on a writ of error from B. R.
Smith ex dem. Dormer v. Packburst,
3 Ark. 138. 2 Stra. 1105.
And. 315.

18 Vin. Abr. 413. pl. 8.
See this case stated at large,
post. tit. Remainder.

(c) These maxims are founded
on the authority of Coke, Plow-
den, and Hale.

22. Lord Ch. J. *Willes* in this case laid down some general rules and maxims of law with respect to the construction of deeds (c).

1st, That such a construction should be made of deeds *ut res magis valeat quam pereat*, that the end and design of deeds should take effect, rather than the contrary.

2dly, That such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor. The words are not the principal things in a deed, but the intent and design of the grantor; and although the judges have no power to alter the words, or to insert words which are not in the deed, yet they may and ought to construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. The law commends the *astutia*, the cunning of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent, may shew the ingenuity of counsel, but is very ill becoming a judge.

Though the law will not admit a perpetuity, yet the intention of the party, so far as is consistent with its rules, ought to be observed.

The

The word *term*, though more properly applied to a term for years, yet may mean an estate for life.

A feoffment differs materially from a fine, for a feoffment is made openly upon the land, and the feoffee immediately put into possession, but a fine has nothing public except the proclamations; and therefore by 4 *Hen. 7. c. 24.* non-claim runs only from the proclamations. A feoffment can only be of land, but a fine may be of tithes and other incorporeal inheritances (a).

A fine is not a feoffment (b) upon record unless the party has such an estate as will entitle him to levy a fine, that is, an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and bars none but the party claiming under it.

only as an estoppel against the party claiming.

(a) *Cruise on Fines*, 121.

(b) Lord Coke says, a fine is a feoffment on record; but Lord Holt and Lord Macclesfield have determined that a fine is a feoffment upon record, where the party has an estate of freehold, otherwise it has no effect with respect to strangers, and operates Co. Lit. 50. Blackst. Com. 348.

A feoffment is the most ancient and sure way of conveyance, both as it is public and therefore best proved, and also as it clears all disseisins, &c. (c), which cannot be done even by fine and recovery (d).

(c) *Vide Dormier v. Fortescue*, 3 Atk. 129. *Townsend v. Ash*, 3 Atk. 339. *Shield v. Atkins*, 3 Atk. 562. With respect to the Harg. Co. Lit. 330. b. (n. 1.)

particular operation of a feoffment in creating a disseisin, *vide Sanders on Uses and Trusts*, 305—324.

(d) *Vide Brexton v. Gamul*, 2 Atk. 240. *Carter v. Barnardiston*, 1 P. Wms. 520.

There are many cases where an act may be void against another, and yet a forfeiture to the person, as a lease made by a copyhold tenant is certainly void as against the lord, and yet is a forfeiture as to himself.

23. There is no difference between a deed and a will, except that the presumption of satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended.

May 1742, cor. Hardwicke, C.
Weyland v. Weyland,
2 Atk. 634.

24. Where the articles and the indenture of settlement bear date on the same day, as in this case, they must be considered as one and the same act, and a different construction ought not to be put upon them.

22 Nov. 1742, cor. Hardw. C.
Heneage v. Hunloke,
2 Atk. 457.

25. Upon the treaty for the marriage of plaintiff with Mr. Tyrrel, articles were entered into and deeds of settlement were consequently prepared; but when they were read over for execution, plaintiff discovered a mistake and a variance between the articles and the settlement; whereupon Tyrrel gave a note in writing, whereby he promised and agreed

10 May 1743, cor. M. R.
Tyrrel v. Hope,
2 Atk. 558, 562.

agreed with Mary his intended wife, that she should enjoy and receive the issue and profits of one moiety of the estate then in the possession of her mother, after the decease of her mother. This note was delivered to the trustees of the marriage to keep for the plaintiff's benefit, and the marriage was shortly had. Then the mother died; then Tyrrel became bankrupt, and his assignees having got possession of the moiety of his wife's rents, refused to let her receive them, or to make any settlement on her, pursuant to the agreement before marriage. The present bill, therefore, was brought by the wife against the husband's assignees, for account of the rents received by them, and that a moiety of such rents may for the future be assured to the plaintiff for her sole and separate use. *Per* Master of the Rolls—The first question is, What relief the plaintiff could have had if she had brought the bill against the husband? And, secondly, If she is entitled to the same relief against his assignees? Upon the deed the wife could have no relief, for there are no words in it that can convey a *separate* estate to the wife; but then it was insisted, that Tyrrel's note supplied this defect, and that a witness had explained this matter fully; against the admissibility of which evidence was cited *Barwdes v. Amburist*.*

* 1 Eq. Abr. 21. where evidence to shew the uses of a settlement was not admitted, because the settlement was not signed by one party.

(a) *Vide* Walker v. Walker, 2 Atk. 98. Ulrick v. Litchfield, 2 Atk. 372. Parteriche v. Pawlet, 2 Atk. 383.

(b) *Watkins v. Watkins*, 2 Atk. 96. is a strong case; there a bond was given by a husband to his wife before marriage to secure a sum of money to her use, which is void at law, and yet in equity will be considered as a trust for the wife.

(c) *Vide* Darley v. Darley, 3 Atk. 399. Graham v. Londonderry, 3 Atk. 393. Lee v. Picux, 3 Bro. Ch. Ca. 381.

In the present case the note insisted on is signed by the husband himself. His Honor said, if the matter rested singly on the note, no parol evidence ought to be admitted to explain the agreement between the parties (a); but the evidence is admissible so far as it goes to the occasion of signing the note. Then as to the effect of the note; though a settlement will control any writing executed after it, yet as the wife refused to execute the settlement without the note, they must be construed as consistent, and as one entire agreement. The note certainly is not good in law against the settlement, but in equity it ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement (b), and therefore the wife would have been entitled to relief had she brought a bill against her husband. Again, as to the effect of the note; plaintiff's counsel contend, that though it is not expressed, yet it is implied in the note, that she shall have this moiety to her *separate* use. The words *separate use* are certainly not in the note, but there are words which amount to it (c), viz. *that she shall enjoy and receive the issues and profits of one moiety*.

unity of the estate, &c. which can admit of no other construction but that it must be for her *separate* use; else to what end does she receive it? The word *enjoy* too is very strong to imply a separate use to the wife. Now as to the wife's remedy against the husband's assignees. It is certain that assignees are trustees for creditors, and that creditors are favoured in equity; but though the legal estate vests in the husband, and by the assignment in the assignees, yet the rule is, that they stand in the husband's place. His Honor said, that rule does not hold in every case; for where there is a voluntary conveyance by a bankrupt, the court may carry it into execution against the bankrupt, but will not against the assignees. *Secus*, where there is a conveyance for a valuable consideration before the bankruptcy, for then the wife takes in consideration of *marriage* and of an estate moving from her. Another reason why the assignees in this case can be considered no otherwise than the bankrupt, is, that what was done on the *marriage* was in nature of a trust for the wife; *ergo*, if the husband was only a trustee for his wife (a), his assignees must be trustees also. Taking all the circumstances together, as the wife would have been entitled to the relief she prays, as against her husband, she is equally entitled to relief as against his assignees (b), but without costs, for as trustees for creditors it was their duty to bring a case so circumstanced before the court (c).

Vide Taylor v. Wheeler, 2 Vern. 561. which comes very near the principal case, for there the legal interest was vested in the assignees.

(a) *Vide Bennet v. Davis*, 2 P. Wms. 316. *Darley v. Darley*, 3 Atk. 399. *Rolfe v. Budder*, Bunb. 187.

(b) *Vide Jewson v. Moulson*, 2 Atk. 417.

(c) *Vide Ex parte Byas*, 1 Atk. 124. *Winch v. Keeley*, 1 Term Rep. 619.

26. The surrender of a copyhold estate must have the same construction with feoffments at law, and other conveyances, and not as a will (d), and if the limitations of a copyhold are so framed as by the rules of law they are void, they must take their fate, and no intention can make them good.

24 Nov. 1743, cor. Hardw. C. *Lovell v. Lovell*, 3 Atk. 11.

(d) Copyhold estates are not within the statute of uses, *Rigden v. Valier*, 2 Vef. 257.

27. A question arose in this case upon a proviso in a settlement, that 1000 *l.* *shall and may* be laid out by the trustees in the purchase of lands. Lord Hardwicke said, *where there is a power to lay out money in land, but the original intention was, that it should be considered as money if not vested in land, it shall not be considered as land and go to the heir.*

20 Feb. 1744, cor. Hardw. C. *Stamper v. Miller*, 3 Atk. 212.

Though the words *shall or may* in acts of parliament have been considered *absolutely* (e), yet here they were inserted only to leave the election to the trustees, either to continue the 1000 *l.* as it was,

(e) *Vide Attorney-General v. Lock*, 3 Atk. 166.

Where money is devised or directed to be laid out in land, in what cases the same shall be considered as money, and where as land. See *post*. tit. *Money*.

26 July 1744, cor. Hardw. C. *Attorney-General v. Sir John Lock & al.* 3 Atk. 166. *Vide Stamper v. Miller, ante.*

25 Oct. 1744, cor. Hardw. C. *Brown v. Jones & al.* 1 Atk. 190.

Vide post. tit. *Marriage*.

(a) *Vide Ex parte Marsh*, 1 Atk. 158. *Lanoy v. Athol*, 2 Atk. 445.

(b) Such a settlement is good not only against creditors but against purchasers. *Vide Colville v. Parker, Cro. Jac. 158. Jones v. Marsh, Ca. temp. Talb. 63. Ward v. Shallot, 2 Vef. 16. Hylton v. Biscoe, 2 Vef. 308. Wheeler v. Caryl, Amb. 121. Lanoy v. Athol, 2 Atk. 444. 446.*

(c) *Vide Negus v. Reynal*, 1 Keb. 12. *Ford v. Grey*, Mod. Ca. 44. 1 Salk. 286.

(d) *i. e.* a consideration of marriage or blood for a pecuniary consideration will not raise a *use* by way of covenant to stand seised; for the reasons of this distinction *vide Sanders on Uses and Trusts*, 558. *Vide also Lloyd v. Spillet*, 2 Atk. 149.—If a person pays a valuable consideration for an estate, and by some defect or omission in the conveyance of the purchased lands to him, the legal estate is not properly conveyed, in this case, though the consideration could not create a *use* by way of covenant to stand seised, yet the *wendor* would be considered a *trustee* for the purchaser. *Vide Pollexfen v. Moore*, 3 Atk. 273.

was, in personal securities, or call it in, and lay it out in land.

His lordship said the heir at law was not at all in the consideration of the settlement, and therefore it appears clear that the 1000 *l.* settled by the deed is to be considered as money. Bill dismissed without costs.

28. *Shall and may* in acts of parliament, or in private constitutions, are to be construed *imperatively, must, &c.*

29. A settlement before marriage without a portion is good, for marriage itself is a consideration (a); and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum, or even an agreement to pay money, if the money be afterwards paid, it is equally good both at law and in equity (b).

It was objected, that the settlement in this case was defective for want of the lease for a year (c). *Per curiam*—The lease being lost does not at all concern the substance of the case; and a consideration being proved, though the lease is missing, the release will amount to a covenant to stand

seised (d).

In the case of voluntary settlements and wills, if there is no declaration of the trusts of a term, it results to the donor; otherwise where it is a settlement for a valuable consideration and in nature of a contract for the benefit of a wife and of the issue.

A limitation in a settlement to a husband for life, to trustees to preserve, &c. to the wife for life for her jointure; and, after the decease of both, to trustees for 99 years, on such trusts as thereafter expressed; and, after the determination of that estate, to the first and every other son in tail: no declaration of the uses of the term. The court always takes an agreement of this kind according

§ 1. *Construction and Operation.*

D—c 529

cording to the nature of the agreement, and therefore considers it only as a trust term to attend the inheritance pursuant to the limitations in the settlement.

In *Uvedale v. Halspenny* (e) the trustees to preserve, &c. were placed after a limitation of an estate tail to the son, and yet decreed the settlement to be rectified, without any evidence of the fact or intention of the parties as to the placing of the limitations (f).

(e) 2 P. Wms. 151.

Puget, 2 Vef. 194. *Worsley v. Lord Grenville*, 1 Vef. 333. *Vide Ridout v. Dowding*, 1 Atk. 419.

(f) *Sic Kentish v. Newman*, 1 P. Wms. 234. *Targus v.*

30. With respect to ancient grants and deeds, there is no better way of construing them than by usage; and *contemporanea expositio* is the best rule to go by.

M. 1747, cor. Hardw. C. *Attorney-General v. Parker*, 3 Atk. 577.

31. In the case of trustees, though there are not negative words in a deed, *that they shall not be liable for the acts of one another*, yet the court will not make them so for more than each has received.

4 Dec. 1747, cor. Hardw. C. *Ligh & al. v. Berry & al.* 3 Atk. 584.

32. When a consideration of love and affection only is mentioned in a deed, and it is not said for other considerations, no proof of other considerations can be entered into, for it would be contrary to the deed. Otherwise, where no consideration at all is mentioned in the deed.

28 Oct. 1748, cor. Hardw. C. *Peacock v. Monk*, 1 Vef. 128.

33. His Honor, in considering how far the intent is to govern in cases of deeds, and how far it is to prevail in cases of wills, said, on deeds the rule is certain that they shall be controled by the rules of law, and the intent that appears on the face of the deeds; for to admit of other constructions, would let in the greatest uncertainty, as is daily seen in the construction of wills. *Heirs of the body*, even in a deed, may be construed as words of purchase at law. *Issue* in a deed is always a word of purchase (a).

12 Nov. 1748, cor. M. R. *Bagshaw v. Spencer*, 2 Atk. 570. 580. 582. 1 Vef. 142.

(a) Co. Litt. 20. *Nevill v. Nevill*, 1 Roll. Abr. 837. R. pl. 1. *Makepeace v. Fletcher*, Com. Rep. 457.

34. *J. T.* made a voluntary settlement, and limited his real estate to himself for life *sans waste*; remainder (*int. al.*) to his nephew *A.* for life; remainder to his first and other sons in tail male; remainder over, in default of such heirs male, to *B.*, *C.*, and *D.*, (sisters of *J. T.*) and to *E.* (his niece) and their heirs, in trust that they or the survivor of them, or the heir of such survivor,

H. 1749, cor. Hardw. C. *Wythe v. Blackman*, 1 Vef. 196. *Ambl. 555. S. C. nomine Wythe v. Thurlston.*

VOL. II.

M m

should

should sell the premises as soon as might be, and divide the produce equally between them (naming them particularly), or the respective issues of their bodies; but if any of them be dead at the time of such failure of issue male of *A.*, share and share alike, viz. to each of them or their respective children one-fourth part, provided that if any of them shall be dead without issue, when there should be a failure of issue of *A.*, then to be equally divided among the survivors of them and their respective children, in case any of them be dead leaving issue. They were all four dead before the contingency happened. Of the three sisters *B.* had children then living; *C.* had children, grand-children, and great grand-children; and *D.* had grand-children, but no children living; and *E.* the niece died without issue. The present bill was brought by the surviving children of *B.* and *C.* to have the whole divided into moiéties, in exclusion of the grand-children of *D.* and the great grand-children of *C.* *Per Lord Chancellor*—This is an extraordinary limitation and disposition of a real estate; but the court must make such a construction as appears agreeable to the intent of the donor and creator of the trust. His lordship doubted whether the property in this case should be considered as land or money; but the parties having agreed to consider it as money, it was so taken. The question is, Whether the children of two of the sisters are entitled to have the whole of this estate divided into two shares among them? Or, Whether the grand-children of the other and the great grand-children are entitled to a share with them? This will turn principally on the construction of the words *issue* and *children*, Whether *issue* is to be restrained and abridged by *children*, or *children* enlarged and extended by *issue*? To pave the way for this construction, the intention, as far as it can be collected, must be considered. And, first, it arises clearly that, though *J. T.* might have in view and expectation that the trust might be executed at no great distance of time, he had in view also that it might arise and take effect at a very great distance, by the limitations to the sons of *A.* continuing several years; so that there might be no possibility of these sisters being then living, as appears throughout the whole, and should not therefore be confined to a speedy failure of issue male. His next general intent was clearly after

after failure of the issue male and these remainders taking place, to make a provision not only for the sisters, if living, but for the several stocks and branches; if the construction for the defendant prevails it answers that intent; whereas that for the plaintiff narrows it to the children of the sisters; and, if the failure should happen at the end of 100 years, when the sisters and all their children are dead, all their descendants would be thereby cut out, and the trust would result to the heir at law, which would certainly be contrary to the intention to provide for their stocks; then consider how the words are capable of a construction to answer this intention. If it rested on the word *issue*, there is no doubt, being a description taking in all issues *in infinitum*, although not in notion of law as estates tail, but as purchasers by description being issue of the body; and there is no difficulty in the thing, the division being very easy and natural among them. The great objection to this is from the *videlicet*; that being an explanatory clause, it restrains *issue* to *children*; but that was not the donor's meaning, which was (as is said for the defendants) principally to explain the shares thereby, although he might mean both. A difficulty might have occurred to the drawer, that one might die, leaving three or four children or grandchildren, who might be construed to come in *per capita* to have equal shares of the whole with the surviving sisters, to avoid which doubt he explains that the issue or children of the deceased should take only the share of the deceased. In *Wild's case*, 6 Co. 16. and in *Bendl.* 30., it is settled that *children* bear a co-extensive sense with *issue*. Why then should not the court take this to be so, if it more fully answers the intention of the creator of the trust, which might take effect at a distance of time? but the proviso is decisive under which the plaintiff's claim, and must bring themselves within the contingency put there, which not having happened, as *D.* leaving grand-children, did not die without issue, it cannot be divided into two shares only; for the death of the niece without issue will only warrant a division into thirds; and the donor understood, when a person is dead without issue, for by the failure of the issue male of *A.* he meant failure of the descendants of his body generally, not of his sons and children only, and has used the words in the same sense. Here *issue* and

M m 2

children

For the plaintiff it was argued, that *issue* in a deed is a proper word of purchase, descriptive of particular persons, which is the primary sense of it, although in wills *ut res magis valeat*, it has been construed a word of limitation. Although the court has gone so far as to construe an elder to be a younger child by its liberal exposition of the trust of a term created for a provision for children in marriage settlements, yet not in other cases. It was so held by Lord Hardwicke in 1742, but the construction contended for goes farther than is allowed even in wills. *Vide Crooke & Ux. v. Brooking & al.* 2 Vern. 107. where it was refused to construe it to children's children. The settlement in the principal case is particularly descriptive of the persons, and the bounds prescribed beyond which it ought not to go. There is no such necessity here as in *Wild's case*; and there is the less necessity for construing this to so remote a degree, as the donor had none other but those four persons in view, who might probably be all living at the time of the sale; if *A.* who was then very young died soon, without *issue*.—The *videlicet* alters and limits the sense of the word *issue*, and denotes both the shares and the persons to take, and where the trust or beneficial interest is more extensive than the legal interest, the court will make the legal as extensive.

Against this was cited *Wild's case*, and that the word *children* often means remote children, appears from that very case in 2 Vern. 106. The *videlicet* was not to explain what *issue*, or the persons who were to take, but only the particular shares; the *provisio* meant a general failure of issue, taking in all the descendants; and by the other construction an accident might happen, which could not be designed, of resulting to the heir at law.

children are again used in a collective sense *in infinitum*. According to the authorities, grand-children and great grand-children are all children, and come within that to certain purposes; and in 2 *Vern.* 106. it is said in the conclusion, that it is allowed by all, if no children are in being, grand-children would come in under the word *children*, and may be thereby described, which is sufficient for the present purpose. This makes the construction consistent with the donor's intent to provide for the execution of the trust at a distance of time, and for the several stocks who would be unprovided for if restrained. An inconvenience is urged, from its being to be divided among a great number, splitting the property, which may not be for their advantage, nor according to the donor's meaning. He has made a provision for such right of representation as the *statute of distribution* allows among collaterals, brothers' and sisters' children, considering the sisters and niece as collateral among themselves (as they were), and it has been held brothers and sisters of the intestate; but that objection holds not on the foot of the intent, which lets in the niece and her children, going one degree beyond the right of representation allowed by the statute, by which grand-children of brothers or sisters are excluded. But the question here is not of the personal estate of the donor, but of those who were to take under it, and then not to be considered on the foot of a collateral but lineal succession, which may go *ad infinitum*, for according to the first clause of the statute all the stocks are to take, and the representation to go on *pro suo cuique jure* to the great-grand-children representing their respective parents, and so not more inconvenient than in cases arising on that statute. It was objected, that nothing vested in the parent by *D.*'s dying in the life of *A.*, so that her children cannot take from her in whom nothing vested. But to give a right of representation, there is no occasion for vesting in the ancestor. Under the statute nothing vests in the ancestor, for then it is gone; so that the children or grand-children of those dying take (not by personal descent, which the law allows not,) that share their ancestor, if living, would have taken, because nothing vested in the ancestor. The word *children* therefore must be explained and extended to issue, and if the grand-children prevail, then the great-grand-children must be let in. The question

question is, Whether they shall take *per capita* or *per stirpes*? The authority of the settlement has shewn in what manner; *per stirpes* as to the stock, viz. that which would have belonged to each sister if living, to go to their respective issues, but to be divided *per capita* among themselves, as according to the statute of distribution in lineal succession; nor is there any objection or inconvenience from their taking *per capita* and *per stirpes* at the same time. Bill dismissed. Costs to come out of the estate.

35. *A.* by deed granted a personal estate to trustees for the benefit of her niece, after her death. The niece died in the lifetime of the grantor. Held, that this estate goes to the representatives of the niece, and not to the representatives of the grantor.

5 May 1749, cor. Hardw. C.
Peck v. Perrott.

36. Devise of land in *Downham* to two sisters and their heirs; if either married without consent, she should have only an estate for life; if either died unmarried, *Robert*, testator's son or his heirs should take it to him and his heirs, paying 500 *l.* to the other daughter. *Robert* in the lifetime of his two sisters, in consideration of natural love and affection, and advancement to his younger son *George*, conveyed and granted all that and other lands whatsoever, whereof he or any one in trust for him had any estate either in law or equity in possession, reversion, or remainder, and which he had any right, title, claim, or demand to under the will of his father in *Downham*. *Robert* died in 1731. In 1744 one sister died unmarried, and the other sister married without consent. Plaintiff, as eldest son and heir at law of *Robert*, brought his bill to have the estate on payment of 500 *l.* to the daughter, who married without consent. *Per* Lord Chancellor—This is a claim by an heir against the act of his ancestor, done for a valuable consideration in the second degree, by way of provision or advancement for a younger child. There are two questions; 1st, Whether *Robert* had such a contingent interest, or right, or possibility, as he could dispose of by any act in the consideration of the court? 2^d, If he had such a contingent interest, as a possibility is properly described to be, whether he did convey it by the deed he executed? *Lord Chancellor* thought he had such as he could dispose of under certain circumstances, though not in all

15 Mar. 1750, cor. Hardw. C.
Wright v. Wright,
1 Ves. 409.

events. Whether this possibility was in him, depended on the disjunctive words in the will, which in this case was very oddly worded; it was a mis-writing; and *or* should be construed *and*, which is a frequent construction, as in a devise or grant to one *or* his heirs to hold to him *and* his heirs; that is, a fee as to the nature of the interest here given. What might mislead in the recital of the deed was, that, if the estates were turned into estates for life, *Robert* would have a vested remainder. But still it was an executory devise (not a remainder) on a fee given before, and in a reasonable compass of time of the life of the daughters, and will thereby go to *Robert* and his heirs; in which case, if the person dies before the contingency happens, his heir takes by descent through him, and not by purchase, which is still in notion of law a possibility; and which, though the law will not permit it to be granted or devised, yet it may be released, as all sorts of contingencies may to the owner of the land. A possibility is assignable in equity for a valuable consideration, and love and affection to a child, and the advancement the parent was naturally bound to make for him, is a consideration in the second degree, and operates by way of agreement, by which the heir would be bound, as in cases of making good defective executions of powers, and devises of copyholds without surrender; that is the same thing, though not in the same shape, the court not laying weight on the manner but the substance. The second question was, Whether *Robert* had in fact conveyed this interest? He certainly intended it, though the deed was awkwardly drawn, for he left out the most proper word, *possibility*. It is true he had no immediate claim or demand; but the word *claim* may describe in *presenti* or *futuro*; and there was a covenant for further assurance. It is therefore well described, and incumbent on the court to make the most liberal construction in favor of a younger child. Decreed the plaintiff had no right to this redemption on payment of 500*l.*, it being contradictory to the conveyance of *Robert* his ancestor. Bill dismissed with costs.

11 July 1750, cor. Hardw. C.
Lord Townsend v. Wyndham,
 2 *Vf.* 10.

37. There is no case where a person indebted makes a conveyance of a real or chattel interest for the benefit of a child, without the consideration of marriage or other valuable consideration, and dying

dying indebted afterwards, that it shall take place. There is certainly a great difference between the statute of frauds of the 13 *Eliz.*, which is in favor of creditors, and the 27 *Eliz.*, in favor of purchasers. But that difference was never suffered by way of general rule to go farther than this:—On the 27 *Eliz.* every voluntary conveyance made, where afterward there is a subsequent conveyance for a valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are, that such mere voluntary conveyance is void at law by the subsequent purchase for a valuable consideration. The difference between that and the 13 *Eliz.* is this: if there is a voluntary conveyance of real estate or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive subsequent creditors, that will be good; but otherwise it will be void. Lord *Hardwicke* knew no case on 13 *Eliz.* where a man indebted makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of creditors; and on that foundation the court has grounded their opinion in the execution of powers, when they stop *in transitu*, and say it shall not be given away from creditors. His Lordship therefore said, he was not warranted to do otherwise, nor could he lay down a rule which would make the rights of creditors precarious.

38. The word *warrant*, when properly applied, has a particular sense; but in general it has a further sense, therefore it is not necessary to consider *warranty* in a deed or covenant barely as a warranty of the title to the realty; for it is to be taken *secundum subjectam materiam*, as where there are chattels to be warranted in a deed, and where there are words binding the executors and administrators, which must be rejected, if construed as a mere real warranty of the land itself.

39. The court always inclines to favor that construction which supports the limitation over, if it can be done, and has laid hold of all opportunities of referring it to a want of issue at the time of the death; as where the words are *leaving no issue*, &c.

M m 4

24 July 1750, cor. Hardw. C.
Williamson v. Coddington,
1 *Ves.* 516.

28 Jan. 1751, cor. Hardw. C.
Exel v. Wallace, 2 *Ves.* 121.
Vide Atkinson v. Hutchinson,
3 P. Wms. 258. *Sabarton v.*
Sabarton, Ca. temp. Talb. 55.
245. *Nichols v. Hooper*, 1 P.
Wms. 198. *Target v. Gaunt*,

1 P. Wms. 432. *Pinbury v. Elkin*, 1 P. Wms. 563. *Forth v. Chapman*, 1 P. Wms. 663. *Pleydell v. Pleydell*, 1 P. Wms. 748. *Madox v. Staines*, 2 P. Wms. 421. *Balguy v. Hamilton*, Mos. 186. Attorney-General v. Hall, Kel. 13. *Beauclerk v. Dormer*, 2 Atk. 308. *Saltern v. Saltern*, 2 Atk. 376. *Sheffield v. Lord Ortery*, 3 Atk. 287. *Trafford v. Boehm*, 3 Atk. 449. *Lampley v. Blower*, 3 Atk. 396. *Chamberlain v. Jacob*, Amb. 71. *Earl of Strafford v. Buckley*, 2 Vef. 181. *Sheppard v. Lessingham*, Amb. 122. *Bodens v. Watson*, Amb. 398. 478. *Keily v. Fowler*, 6 Bro. P. C. 309. *Grey v. Montagu*, 6 Bro. P. C. 429. *Earl of Chatham v. Tothill*, 6 Bro. P. C. 450. Attorney-General v. Hird, 1 Bro. Ch. Rep. 170. *Bigge v. Bensley*, 1 Bro. Ch. Rep. 187. *Wicker v. Mitford*, 1 Harg. Law Tracts, 513. *Glover v. Strothoff*, 2 Bro. Ch. Rep. 53. *Doe v. Lyde*, 1 Term Rep. 593. *Goodtitle v. Pegden*, 2 Term Rep. 710. *Knight v. Ellis*, 2 Bro. Ch. Rep. 570. *Porter v. Bradley*, 3 Term Rep. 143. *Hockley v. Macobey*, 3 Bro. Ch. Rep. 82. and 1 Vef. jun. 143.

2 Mar. 1751, cor. Hardw. C.
Lord Trynham v. Webb,
 2 Vef. 198.

* It appears that Lord T. the plaintiff's father, married this daughter *Elizabeth*.

40. A grandmother, under a power which she had over an estate, created by deed a term of 500 years, to commence after the death of herself and her daughter *Elizabeth**, (to whom she gave a life interest,) to raise money for younger children, with a power to their father to appoint amongst all his children, except his eldest son; and in default of his appointment, then in equal proportions, share and share alike. If it should happen that the father should have but one child besides the eldest son, the whole money was to be paid to such child; and, if none except the eldest son, then to that eldest son; if no eldest son, then to the executors and administrators of the grandmother. At the time of making this deed in 1710, the father had *Philip* a son and *Mary* a daughter. Afterwards he had another son, the present plaintiff. The father died in 1723, without having executed his power. *Philip* died in 1727, under age, on which plaintiff, then about 18, succeeded to the honor and estate of the family. In 1729 *Mary* married *Mr. Webb*, with consent; in 1730 the grandmother died, and her daughter in 1732. Plaintiff used at first to receive the interest of the money, and pay it over to his sister and *Mr. Webb*; but afterwards he brought his bill to have a moiety raised and paid to him, with the interest thereon; or that, if his sister had received all the interest of the whole sum, she might account to him for one moiety of that interest, in consequence of his right. *Per cur.*—1st, The construction of the trust of this term must be considered; and, next, the transactions which are insisted upon as a waiver or acquiescence on the part of the plaintiff, Lord *H.* did not think it necessary to enter into the variety of determinations on the head of portions, and especially for younger children. His Lordship could

§ 1. *Construction and Operation.*

D—e 537

could not think the plaintiff entitled in equity to have this money raised for his benefit. The rules of the ecclesiastical court, which equity follows in legatory cases, are not applicable, this being the case of a deed on the trust of a term, and the construction and execution of it in equity. Neither are the cases and rules applicable, which are laid down and established in equity, as to sums of money, by way of portion, charged on land sinking into the estate (a); because, in respect to the present parties, and the rights they claim, this must not be considered a sum of money charged on land. The subject of present consideration is, a sum of money which must in all events be raised out of the estate; for, if none of the objects should be in existence, it must be raised for the grandmother's executors; so that the contest is between persons claiming a chattel interest, and not with the owner of the inheritance charged. The remaining question is, when this sum of money shall absolutely vest to all intents and purposes; no particular time is mentioned in the deed which distinguishes this case from *Butler and Duncomb* (b). The time it is to vest must arise from construction. Four times may be mentioned; 1st, The execution of the deed, for children were then in being; 2dly, The commencement of the term in possession, the death of the grandmother; 3dly, The death of the father; and, 4thly, After the death of the grandmother and her daughter *Elizabeth*, when the money was to be raised and paid. It does not necessarily follow (as the plaintiff has supposed) that this could not possibly be vested at any time before the death of the father, by reason of his power of appointment; for it might be taken to be vested in some person or other, subject to his power of varying the proportions, it being to all the children, not to such as he should appoint; for, if it had been so, it would be necessarily suspended, and nothing could have vested till he had executed his power, which differs this case from *Duke of Marlborough v. Lord Godolphin* (c). His Lordship could not see that it is to be suspended till the death of the father, for his power would operate over it notwithstanding.

1st, If (as the plaintiff's counsel have said) the *eldest son* means the eldest in being at the making the deed, Why should not *younger children* relate to the execution of the deed? Why one be con-

(a) Lord H. observed, that wherever this question has arisen, it has been between the owner of the inheritance and the person claiming the benefit of the charge; and in all those cases, if the claimant of the money should die before the contingency has happened, it sinks into the estate in favour of the owner of the inheritance.

(b) 1 P. Wms. 443. (correctly reported), in which the vesting before the commencement arose from the words "payable at 21 or marriage."

(c) 2 Vef. 61.

finer more than the other? If it is not to relate to that, the true construction must be a continuing eldest son at some period of time running on farther. It would be absurd to construe this to relate to the time of executing the deed, and to vest then; and it would plainly defeat the intent, which was to take in all the younger children of her daughter; but to shew the uncertainty of vesting in cases of this kind, suppose more younger children living than one, and it could have vested, it would be subject to divest; and it was truly said for defendant, that in all limitations, whether of real or personal estate, if it does not vest in the first born, on the birth of others it divests, in order to answer purposes of families, and intent of the parties; and in *Stevens v. Stevens* (d) there was a great confusion of that interest, and yet *B. R.*, on a case made for that court, held it might be to answer the purposes and occasions.

(d) Ca. temp. Talb. 228.

2d, As to the next time of vesting; the commencement of the term in possession; was it to vest in the children in being at that time, it is out of *Butler v. Duncomb* (e); because in that case there was a particular time which the court held necessary to compel the vesting at that time. It would be a strange construction to say it should be absolutely vested to all intents, whenever the term happened to commence by the death of the grandmother, for she might have died in the lifetime of both father and mother. Should it vest in the younger children at that time? Other younger children might be born afterwards, who certainly ought not to be excluded, but be let in by divesting; but, should any part of it be vested at that time, the consequence would be contrary to the intent of the parties, viz. that if any of those younger children in being at the time of the commencement of the term, had died in the life of the father, that share would have gone to that father, who would have taken all personal rights vested in that younger child, consequently it would take out of the provision intended for the younger children, and give it to the father, which is strong against construing this absolutely vested at the time of the commencement.

(e) 1 P. Wms. 448.

3d, As to the third time, plaintiff insisted it should absolutely vest in the younger children at the death of the father, and never divest. The consequence of that would be, the father might die,

die, leaving a wife and children, some of them very young; and, if this was so absolutely vested in them, on the death of any of tender years, the mother must have shared with the surviving children, and the money would be raised to the prejudice of the survivors, for the benefit of the representative. That would be contrary to *Bruen v. Bruen* (a), and to *Tournay v. Tournay* (b), where no time was mentioned; yet, as the child died before the time it could want a portion, and this was intended as a portion, it should not be raised for the representative of that child. This mischief would happen if it vested at the death of the father.

(a) 2 Vern. 439.

(b) Prec. in Ch. 290.

4. As to the next point of time contended for on the part of the defendant, for the vesting, when the money was to be raised, it was compared to cases of legacies where there are no other words of gift or legatory words but the direction to raise and pay, (as it is here,) and that it cannot vest before, being a gift at that time only; now there may be much inconvenience in saying, that to no purpose or in no manner it should vest till that time, for if all the younger children had died in the lifetime of *Elizabeth*, who might have lived a good while, and it was never to vest until then, it would have gone absolutely to the eldest son; and though a younger child had married and wanted its portion ever so much, according to that doctrine, that child would be entirely defeated of its provision, though married and left children; nay that inconvenience might have fallen on the defendant herself, for then if she had died before *Elizabeth*, and though her husband relied on this portion, her family could have no benefit of it, and it would have gone to the eldest son.

It is necessary then for the court to take a middle way in the construction of this declaration of trust, and in respect of the vesting. Notwithstanding this is a voluntary provision for younger children by a grandmother, not by a father or marriage settlement, yet it must be construed as the court construe provisions for younger children made on the marriage of the parents, for it was plainly so considered by the parties themselves; and with this view, probably, they trusted to her making a provision for the younger children, and she did it, but did it as a parent providing for the younger children of her daughter, who were so nearly

(a) 2 Vern. 538.

nearly descended from herself, and a grandmother in equity is often considered as a parent. If it is to receive the same construction, the middle way to avoid all the inconveniences and absurdities which would arise from construing this money absolutely vested at any of these times, is the same that was taken by Lord Cowper in *Chadwick v. Doleman* (a), which is the true way to avoid them. It is a strong authority, and the arguments are properly urged there; Lord Cowper found it established by the precedents and authorities of the court, that the words *younger children* had received a prodigious latitude of construction, to answer the occasions of families and intent of the parties, often construing an eldest daughter to be a younger child; that is carrying the words very much out of the natural into a foreign and remote sense to answer the intent; and he found it determined that an only daughter, though not younger in comparison with another, should be considered as a younger child where a provision was made for younger children, and no other provision, and the estate limited to go over: and there have been cases where a younger son, becoming an eldest under certain circumstances, has been considered as an eldest to exclude him from the benefit of the portion; and therefore the rule laid down by Lord Harcourt in *Beal v. Beal* (b) has been, that younger children shall be considered such as do not take the estate, and are not the head of the family. Lord Cowper from thence inferred a tacit condition, that the capacity of being a younger son should continue until the time of payment came, and therefore make that determination though the father had actually executed his power. Taking it in *abstracto* merely as an execution of a power, it could not possibly be maintained upon the general rules, for the rule of law is, that if a power is given to be executed, and is once executed in the life of the party, and no power of revocation reserved, it cannot be revoked and executed a-new (c): but the ground on which Lord Cowper went was, that the continuing of the capacity to the time of the provision taking effect, in point of payment, was a tacit or implied condition, going along with the appointment. Suppose the father had executed his power in his life, appointing so much of this money to the plaintiff, so much to his sister, and to the rest, if he had more children; and afterwards

(b) 1 P. Wms. 244. in which case an eldest daughter, where there was a son, or where the estate by settlement went to a remainder-man, was held a younger child in equity. Mr. Coxe, the editor, in his note to that case, says, The court will indulge this latitude of construction in cases of portions, for the sake of providing for all the branches of the family. *Vide Chadwick v. Doleman*, 2 Vern. 525. *Heneage v. Hunlock*, 2 Atk. 456. *Duke v. Doidge*, cited, 2 Vex. 203. *Pierson v. Grant*, 2 Bro. Ch. Ca. 38. but the same construction is not applicable to other cases. *Vide Hall v. Hewer*, Amb. 203.

(c) So held in *Hale v. Bond*, in Dom. Proc. 1 Eq. Abr. 342. and in other cases.

§ 1. Construction and Operation.

afterwards the plaintiff, by the death of his elder brother in his father's lifetime, had become eldest, and the father had executed a new appointment among those he thought remained younger after that, that would have been good within the authority of *Chadwick v. Doleman* (a); for it is impossible to say the first appointment should take place, and the second not, consistent with this authority which has stood and so far allowed in *Jermyn v. Fellows* (b). How does the present case differ? If this construction of the power being executed *sub modo* and the tacit condition, is to be implied in the execution of the power, it must be implied in the direction, in default of appointment, the object being the same. Younger children cannot be construed to mean one thing in case of a default, and another in the execution of a power; it means the same in both. Although Lord Cowper seems to have taken a great latitude, yet his construction is very reasonable, and made to answer the intent of parties and avoid absurdity, agreeable to the general grounds in construing the words *younger children*. Had the grandmother, at the making of the deed, been asked if she meant that a younger son, becoming an elder and taking the estate, should have part of this, she would have said *no*. In modern settlements people cautiously guard against this by inserting a clause and condition agreeable to the reasoning of Lord Macclesfield in *Butler v. Duncomb* (c). In Lord Londonderry's (d) case there was no contest between him and his sister, but between him and his own estate, he having been a younger child at the death of his father, and afterwards sued to have the settled estate; there was no person before the court to oppose it, nor was it much argued. The court, considering there had been many cases in which a man had come to be owner of an estate subject to a charge, for the benefit of the same person where the estate and the charge were looked upon as different things, and had directed the charge to be raised for his benefit, ordered the same to be done in that case, and particularly on this ground, that in the conclusion of the declaration of trust of that term there were particular clauses on which the trust thereof should cease, and this was none of them, and therefore, as there was none concerned to dispute it, the court directed it to be raised, though there may perhaps hereafter be a question between Lord Londonderry and his eldest son,

(a) 1 Vern. 528.

(b) Ca. temp. Talb. 93.

(c) 1 P. Wms. 448.

(d) *Graham v. Lord Londonderry*, 24 Nov. 1746.

(a) 2 Vern. 528.

son, if he should dispute it. On the authority of *Chadwick v. Doleman* (a), Lord Hardwicke was with the defendant on the first point; and his lordship was clearly of opinion that there is no sound distinction between construing that tacit condition of the continuance of the capacity of a younger son in the execution of a power of appointment, and in the default thereof.

As to the second point, the subsequent transactions are very material. The marriage of the defendant during the infancy of the plaintiff (who did not appear to encourage or be consant of it) cannot bind him. It aggravates the hardship of the case; but if people mistake their right, and accept a security with their eyes open, it cannot be helped. Plaintiff was then 19, and if he had been privy to the transaction, unless he had been clearly ignorant of his right, it might have affected him, for there

(b) As where an infant who was issue in tail, had engrossed a mortgage of that estate, the court held him excluded for concealing his right.

are cases where an infant may be bound (b). The next transaction is a strong affirmation of the plaintiff's right. It appears by the case, that Mr. Webb having given his father a note to pay him 3500*l.* out of the sum which was to be raised for his wife's portion, and that Mrs. Webb after her husband's death purchased that note for 1500*l.*, to which the plaintiff was proved to be privy, and not only to have encouraged his sister thereto, but also to have assisted her in raising the money; Lord Hardwicke said, that though this was a composition on the part of the defendant's husband with his father, it was a composition of the whole sum, and the 3500*l.* exceeded the share the wife would be entitled to upon the construction contended for by the plaintiff. To have acted properly, plaintiff should have acquainted her he had a demand on this sum, but he never insisted on his right at any time when he paid the interest. Plaintiff might have been ignorant of his right, but he should have put that in issue by his bill, and he should (materially) have charged when he came to the knowledge of his right, which he might have proved. Nothing appears but an acquiescence, and receiving interest for his sister. If the matter had been put in issue by the answer, Lord Hardwicke would have dismissed the bill *with costs*: but as it was, his lordship dismissed it *without costs*.

25 Mar. 1751, cor. Hardw. C.
Rigden v. Valier, 2 *Ves.* 255.

41. A deed, in consideration of love and affection, is good without livery, by way of covenant to stand seised; because that does not operate by transmutation

mutation of possession, but the use remains in the grantor until taken out of him by force of the consideration.

42. Lady S. a few days before her marriage with *B.* (though in contemplation of marriage with one *G.*) conveyed her estates to trustees, in trust to pay the rents and profits during her life, to such uses as she, whether covert or sole, should appoint, and made an assignment of her personal estate to the same uses. Soon after the marriage *B.* by force compelled Lady S. to execute a deed revoking the uses of the conveyance. Upon a bill by Lady S. to establish the conveyance, and have the deed of revocation delivered up, *B.* by his answer swore that he had no notice of the conveyance or assignment before his marriage; and *B.* then filed a cross bill to set aside the deeds of settlement, as a fraud upon him, and in derogation of his marital rights. *Per Buller, J.*—It is admitted by the answer of Lady S. to the cross-bill, that *B.* was unacquainted with the settlement at the time of the marriage, it was therefore a fraud upon him. Equity will not hold any act valid that is done either by man or woman in disparagement of the rights of marriage. A husband by marriage is a purchaser, and of the highest kind the law knows; nor can a woman before marriage defeat him of those rights without his knowledge. A deed executed with such view is fraudulent. Lady S. contended there was no fraud on *B.*, for that the settlement was made with a view to a marriage with *G.* If it was with a general view to any marriage it is fraudulent against any future husband; and, although the deed was made with the knowledge of *G.*, yet being concealed from *B.*, it was a fraud upon him. Every suppressed deed ought to be set aside. Lady S. was apparently in possession of large estates, and *B.* married her as *bona fide* in possession. A private conveyance to deprive the husband of his marital rights, entitles him to the relief afforded by a court of equity, to shew which there are several cases (*a*). In the present case there is no provision for children, as suggested in the bill. According to the cases, (in the margin) the principle is established, that a widow cannot for general purposes make a secret conveyance to defeat the right of her second husband. An issue was afterwards directed to try whether

T. 1783, cor. Buller, J. abf. C.
Lady Stratmore v. Brown,
2 Bro. Ch. Ca. 345.
3 Ves. jun. 28.
1 Eq. Abr. 59.

(a) *Carleton v. Earl of Dorset*,
2 Vern. 17. 1 Eq. Abr. 59. was
a conveyance by the wife before
marriage, to trustees, to permit
her to receive the rents and pro-
fits, and act as she, whether co-
vert or sole, should appoint. She
was crazed in understanding, and
endeavoured to run away; her
husband knew nothing of the

deed. Decreed to be set aside. *Edmonds v. Donington*, cited in *Carleton v. Dorset*, is in point with the principal case—So in *Tudor v. Samyne*, 2 Vern. 270. the second husband's mortgage of a term settled by the former husband to the separate use of the wife, was held good. In *Hunt v. Matthews*, such a settlement was held binding on the second husband; but that was for the provision of the first husband's children. In *Poulson v. Willington*, 2 P. Wms. 533. Ld. Chancellor said, if the second husband had had no notice of the first deed, it would have been void. In *King v. Cotton*, 2 P. Wms. 674. Lord Chancellor dismissed the bill; but upon the former hearing he said, that such a settlement by a woman before marriage seems fraudulent.

whether the deeds of revocation were executed under duress, and found that they were.

Mr. Justice *Buller* then gave judgment:—After the issue the decree on the first bill is to have the settlements established, and the deed of revocation is to be put out of the case, that *B.* may not be estopped from disputing the validity of the deed, but go into the remaining question, Whether the deed of settlement should be delivered up to be cancelled, as prayed by *B.* in the cross bill? The cases on this point may be divided into two classes; those relating to women who never were married, and those relating to widows with children. The cases of the first class decide, that if the wife holds out that her intended husband will have her property, the deed is void for fraud, but they go no farther; for, if such deeds were universally void, the second class of cases could never have existed, for children could make no difference. If they are good in any case, to avoid them the party must shew to the court that the husband has been deceived: mere concealment is not enough. In the present case, however, the settlement was established, and defendant *B.* was decreed to account; but it was upon another ground: he resorted to the court to obtain his wife's fortune; but he did not offer to make a provision for her; and whosoever goes into equity must do equity. On this ground the court refused the relief prayed.

27 Jan. 1789, Canc.
Bigland v. Huddleston,
3 Bro. Ch. Ca. 285. (n.)
Vide S. C. more at large, *post*.
tit. Election.

4 Dec. 1789, cor. Thurlow, C.
Doran v. Ross,
3 Bro. Ch. Ca. 27.

43. The doctrine of election has been in general confined to the cases of wills; but in this case it was determined, that the party should in like manner be put to his election, where he claims under a deed.

44. In the marriage settlement of plaintiff with *A. D.* there was a life estate in 320*l.* per ann. given to the husband for life; and there was a provision made of 500*l.*, in case of the death of the wife without children, for her nephew; but it was so expressed as to stand doubtful, whether in that event the whole did not go over to the nephew. It was a question of construction, whether her should not be construed *his*. Lord Chancellor refused parol evidence to explain the intention of the deed, and then said, that if there was any recital to which the expression in the deed was contrary, he should consider which were the means to come at it; but that without some such guide he

he could not change the words of the settlement, for there was no authority on which he could do it.

46. In construing an instrument the whole context must be considered. 13 Nov. 1792, cor. Lds. Comrs: *Attorney General v. Tenner*, 2 Ves. jun. 7. *Vide* Butler v. Duncomb, 1 P. Wms. 457.

47. An absolute conveyance was in this case decreed to be only a security on parol evidence, it being clear on the written evidence and the accounts of the parties, that the agreement was not what the deed purported to be. 2 Dec. 1793, cor. Thurlow, C. *Cripps and others v. Lee & al.* 4 Bro. Ch. Ca. 472. *Vide* Ironham v. Child, 1 Bro. Ch. Ca. 92.

48. The construction of covenants is the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default. 14 Mar. 1798, cor. Arden, M. R. *Eaton v. Lynn*, 3 Ves. jun. 690. *Vide* Bayley v. Leominster Corporation, 3 Bro. Ch. Ca. 521.—

1 Ves. jun. 476. on the principles of which his Honor decided this case.

For the Construction, Operation, and Effect of Agreements on Marriage, and of the several Uses and Trust thereof, see *post*. tit. *Marriage, Trust*.

SEC. 2. Of voluntary Deeds, and where a Defect therein shall be supplied in Equity.

1. *F.* S. having lands in *A.*, *B.*, and *C.*, (those in *A.* being of equal value to those in *B.* and *C.*) and having two nephews (sister's sons) whom he intended to make his heirs, to prevent disputes about the partition of his estates, he made a conveyance in his lifetime, whereby he settled all the lands to the use of himself for life, remainder to his issue (if any) in tail, and then appointed the lands in *A.* to his nephew *H.*, and the lands in *B.* and *C.* to his nephew *L.* In the enumeration of the lands in *B.* and *C.*, a farm of 60*l.* *per ann.* was omitted, but after the limitation of the lands to his nephew *H.* were added these general words: "And all other my manors, lands and tenements, whereof no use is already limited, the same shall be to the use of my nephew *H.*" Decreed, the land in question to descend equally between the two nephews.

H. 1681, cor. Finch, C. *Lee v. Sir Robert Henley*, 1 Vern. 37. 1 Eq. Abr. 170. pl. 1.

2. Though generally a defect in a voluntary conveyance shall not be supplied in equity, yet a

P. 1632, Canc. *Thompson v. Atfield*, 1 Vern. 40. 1 Eq. Abr. 170. pl. 2. *Vide* Clavering v. Clavering, 2 Vern. 473.

voluntary settlement as a provision for children shall be made good.

22 Nov. 1682, cor. Finch, C.
Villers v. Beaumont & al.
1 Vern. 100.

3. *A. B.* took a lease from an hospital in *L.* for three lives, in trustees' names, in trust for her and her heirs. She died, and the lease came to *W. B.*, who shortly before his death, on a scrap of paper under his hand and seal, (at an alehouse,) settled this term (which he had only in trust) upon plaintiffs his cousins, giving them the surplus after payment of his debts. Afterwards *W. B.* made his will, devising this term to his half brother Lord *B.* subject to the payment of his debts. The question was, Whether the deed or will of *W. B.* should prevail? *Per cur.*—If a man improvidently binds himself by a voluntary deed, and does not reserve a power of revocation, he must lie down under his own folly; for to relieve in such case, would be to establish this absurd proposition, *that a man can make no voluntary disposition of his estate but by will.*

P. 1687, cor. Jeffries, C.
Longdale v. Longdale,
1 Vern. 456.

Vide ante, tit. Condition, f. 5. more fully stated.

4. Equity will not relieve against the breach of a condition in a voluntary settlement.

T. 1687, cor. Jeffries, C.
Bale v. Newton,
1 Vern. 464.

5. After a voluntary settlement a man cannot devise the same estate, though for payment of his debts.

A settlement, though voluntary, is not revocable, nor the estate so settled chargeable by will.

T. 1687, cor. Jeffries, C.
Jennings v. Selleck,
1 Vern. 467.

Lord Chancellor considered the lease in question, not a trust for the father, but an advancement for his child.

6. A purchaser, with notice of a voluntary lease made by the vendor to his own daughter, took security from the father (the seller) that his daughter when of age should surrender the lease. Decreed, The daughter shall enjoy the lease against the purchaser.

H. 1688, cor. Jeffries, C.
Kelley v. Berrey,
2 Vern. 35.
Vide Bunce v. Phillips,
2 Vern. 50.

7. A remainder-man in tail in a voluntary settlement brought a bill for discovery of the deed, but it appearing that the entail was discontinued, the court would not relieve him.

P. 1688, cor. Jeffries, C.
Bunce v. Phillips, 2 Vern. 50.
1 Eq. Abr. 167. pl. 2.

Vide Kelley v. Berry, 2 Vern. 35.

8. Bill to discover an antient deed of entail alleged to be in defendant's hands. Defendant pleaded conveyances made to himself of the estate in question, so that if there was any such entail, the same was discontinued. Plea allowed; and the court said, they would not aid the issue in tail against

§ 2. Voluntary—Defects supplied.

D—e 347

against a discontinuance, though by a voluntary conveyance.

9. It is discretionary in a court in equity, whether to aid voluntary conveyances or not, where there is no remedy at law.

M. 1689, cor. Jeffries, C.
Bold v. Corbett,
Prac. in Cb. 84.

10. The court of Chancery can decree a conveyance to be fraudulent, merely for being voluntary, and that without any trial at law. It was so decreed in this case.

T. 1690, cor. Lds. Comm.
White v. Hefley & al.
Prac. in Cb. 14.
2 *Eq. Abr.* 478. pl. 2.

11. A lessee at a rack rent and who paid no fine, is a purchaser, and shall avoid a voluntary conveyance.

M. 1695, Canc.
Sbeto & al. v. Lady Standish & al.
2 *Vern.* 327.

12. A. makes a voluntary settlement on B., who afterwards agrees to deliver it up without consideration. This agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily.

H. 1676, cor. Somers, C. S.
Wentworth v. Deverghy,
Prac. in Cb. 69.
2 *Eq. Abr.* 51. pl. 2.

13. Voluntary articles shall never be set aside against an absolute purchaser, although such purchaser had notice by being a party to the articles; but *quere*, for there was another point in the case (a), which might be the foundation of the judgment.

14 Jan. 1702, cor. Wright, C. S.
Powell v. Playdell,
18 *Vin. Abr.* 118. pl. 5.
2 *Eq. Abr.* 682. pl. 1.

(a) Lord Keeper's dismissal of plaintiff's bill was affirmed in Dom. Proc.; but no other point appears there, as the foundation of his lordship's judgment. 1 Bro. P. C. 5.

14. J. S. made a voluntary settlement to trustees and their heirs, in trust to receive the profits, &c. and put them out from time to time for the increase of the fortune of his daughters A. and B., and if either of them die before 18 or marriage, the whole to go to the survivor; and also executed a bond to the same trustees for payment of 1000*l.* at a certain day, in trust for the same daughters, but kept both deed and bond, and received the profits of the estate till his death. After the execution of the deed and bond, J. S. by will taking notice of the bond, gives to his said two daughters legacies, in full satisfaction of the benefit of the said bond; and the surplus of his personal estate, after debts and legacies paid, to be equally divided between his said daughters and his four younger children. On a bill by the daughters to have an account of the personal estate, and a satisfaction out of the profits from the date of the settlement, and of the 1000*l.* with interest from the time it was payable. Wright Lord Keeper said, these were the father's

M. 1702, cor. Wright, C. S.
Barlow v. Henning,
Prac. in Cb. 216.
2 *Eq. Abr.* 283. pl. 2.

deeds, and he could not derogate from them; but at last the defendants agreed to set the profits of the lands received during the father's life against the two daughters' maintenance, but the plaintiffs insisted to have interest on the bond for the time the money was payable, and it was decreed accordingly.

M. 1702, cor. Wright, C. S. & M. R.
Watts v. Bullas, 1 P. Wms. 60.
 2 Eq. Abr. 286. pl. 2.
 230. pl. 5.

The authority of this case is controverted by Lord Hardwicke, in *Goring v. Nash*, 3 Atk. 189.

15. A voluntary conveyance to a brother of the half blood, which was void and defective at law, decreed to be made good in equity against the heir.

Vide ante, tit. Copyhold, f. 3. pl. 18. S. C. *et vide post*, tit. Power.

H. 1704, cor. Wright, C. S.
Clavering v. Clavering, & al.
 2 Vern. 473.

16. *A.* in 1683 made a voluntary settlement of an estate subject to some annuities, in trust for his grandson and his heirs, and afterwards, in 1690, he made another voluntary settlement of the same estate, to the use of his eldest son for life, remainder to his first, &c. sons in tail, with remainder over; and by his will he gave a considerable estate to his grandson. Although it was proved that *A.* always kept the settlement of 1683 in his custody, and never published it, and that after his death it was found among waste papers; and that the deed of 1690 was often mentioned by him, and he told the tenants that plaintiff was to be their landlord after his death, yet the son could not be relieved against the first settlement.

Rule—The first deed and the last will shall take place.

Prec. in Ch. 235. and 1 Eq. Abr. 24. pl. 6. states S. C. thus:

A father makes a voluntary settlement on his eldest son and his heirs, without any power of revocation. Afterwards he makes a settlement on his second son for life, with remainder to his first and other sons in tail, and dies: the first deed came to the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first; but both sons having been otherwise provided for, it was held by Lord Chancellor, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first; and his lordship's decree was afterwards affirmed in parliament. 1 Bro. P. C. 112.

Vide Villers v. Beaumont, 1 Vern. 101. *Bale v. Newton*, 1 Vern. 464. *Naldred v. Gillham* 1 P. Wms. 577. *Boughton v. Boughton*, 1 Atk. 625.

Lady Hudson's case, cited in *Clavering v. Clavering*.

A. being displeased with his son, makes an additional settlement for his wife's jointure, but keeps the deed in his own custody, and being afterwards reconciled to his son, cancels it. The wife after her husband's death finds the cancelled settlement, and recovers by virtue thereof.

T. 1715, Canc.
Bosse v. Grey Bart.
 2 Vern. 693.

17. A voluntary covenant is not to be carried in equity beyond the letter.

T. 1716, cor. Cowper, C.
Buckley v. Arnold,
 22 Vin. Abr. 20. pl. 10.
 2 Eq. Abr. 752. pl. 2.

18. *B.* and *C.* are brothers. Lands were conveyed to *C.* and his heirs, in trust for *J. S.* a stranger, for life, remainder to *B.* in tail, remainder

§ 2. *Voluntary—Defects supplied.*

D—e 349

mainder to C. in fee. During the life of Y. S. (the tenant for life,) C. in consideration of 5s. conveys the reversion to B. and his heirs in fee. B. supposing he had an absolute fee in himself, devises the lands to his executors to be sold for payment of debts and legacies, and makes his brother C. and another person executors, and dies without issue. C. sells the lands to the defendant, who had notice of all these transactions, &c. The question was, If the defendant, being a purchaser for a valuable consideration, should avoid the conveyance from C. to B. of the reversion in fee, (being voluntary,) it being, at the time of the conveyance, a dry reversion in fee, expectant upon an estate tail, and of no consideration in the eye of the law. *Cropper*, C. was of opinion, that the conveyance of the reversion in fee from C. to B. could not be avoided as fraudulent by a subsequent purchaser, because at the time of the conveyance it was of no value, being barrable by the tenant in tail by a recovery, with consent of the tenant for life; yet he granted a trial at law, upon the importunity of counsel.

19. K. N. made a voluntary settlement on her nephew A., in which there was no power of revocation, keeping the deed in her custody. Afterwards the nephew's father got an attested copy of this settlement, and then the aunt burnt the deed, and settled the premises on her nephew B., delivering the settlement into B.'s custody. The nephew A. brought his bill to establish the first settlement, which was dismissed with costs; whereupon B. filed a bill, claiming under the second settlement, and to have the attested copy delivered up; and Lord Chancellor decreed accordingly.

claiming under a voluntary conveyance, for that the suppressing and destroying the deed was a fraud, though done by the grantor herself, and though the defendant was not aiding or abetting to it, and that a volunteer shall be aided in equity against a fraud. And his Honor decreed, that the plaintiff be quieted in the possession, and the title deeds delivered to him. 22 Vin. Abr. 20. (n.) to pl. 9. But his Honor's decree was reversed per Lord Chancellor, *ut supra*.

Of two voluntary settlements, if the first be made absolute against the intention of the party, the second shall prevail.

20. Equity will not take away any defence the party may have at law to a voluntary deed: otherwise, if a deed for a good consideration were discharged by a voluntary release.

M. 1710, cor. Parker, C.
on appeal from the Rolls.
Naldred v. Gillbam,
1 P. Wms. 577.
2 Eq. Abr. 52. pl. 7. 287. pl. 2.
Vide Young v. Cottle, 1 P.
Wms. 102. Ward v. Lant, Prec.
in Ch. 182. Clavering v. Claver-
ing, 2 Vern. 473. S. C. Bro.
P. C. 122. Cotton v. King,
2 P. Wms. 359. Boughton v.
Boughton, 1 Atk. 625.

Note; When this cause was
heard at the Rolls, in P. 1718,
his Honor held that the plaintiff
ought to have relief, though

M. 1730, Canc.
Praund v. Turner,
Fitzgib. 105.

H. 1731, cor. Talbot, C.
De Gollis v. Ward,
 2 Eq. Abr. 119, pl. 1.
Vide Read v. Ward, 2 Eq.
 Abr. 119, pl. 3. stated fully *ante*,
 tit. Bankrupt, sec. 4. pl. 6.

3 April 1733, Dom. Proc.
Cotter Esq. v. Earl of Barrymore,
 4 Bro. P. C. 80.

5 Dec. 1739, cor. Hardw. C.
Boughton v. Boughton,
 1 Atk. 625, 626.
 (a) *Vide* Villers v. Beaumont,
 2 Vern. 100. So a subsequent vol-
 untary conveyance shall not set
 aside a voluntary settlement, *vide*
 Allan v. Arme, 1 Vern. 365.

Clavering v. Clavering, 2 Vern. 473. *Young v. Cottle*, 1 P. Wms. 102. But equity will not carry an agreement into execution without a valuable or meritorious consideration, *vide* Colmay v. Sorrell, 3 Bro. Ch. Ca. 12. *Williamson v. Coddington*, 1 Ves. 512. So a fraudulent deed is no revocation of a prior will. *Hawes v. Wyatt*, 3 Bro. Ch. Ca. 156.

(b) *Vide* Ward v. Lant, Prec.
 in Ch. 182.

P. 174b, cor. Hardw. C.
Harvey v. Harvey,
 Barn. Rep. in Ch. 110, 111.
 2 Eq. Abr. 670, pl. 21.

See the former part of this case
 Barn. 103—109. 2 Eq. Abr.
 669, pl. 20. *et post*. tit. Power.

His lordship said, that the rule which had been laid down, that a wife or child, who comes into equity to have the benefit of a defective execution of a power, or a defective provision for them, must be a wife or child totally unprovided for, is a wrong rule.— That in cases on this subject it

21. A pretended sale of lands by Ward shortly before his bankruptcy to his brother, was set aside, on a bill brought by the assignees on the stat. 1 Jac. 1. cap. 15. whereby voluntary conveyances by persons who after become bankrupts are void. Obj. That such a conveyance would be void at law, and need not come into this court to set it aside, *sed non allocatur*.

22. A. filed his bill to be relieved against a long lease granted by his ancestor, on the foot of fraud, but not giving sufficient evidence of the fraud, his bill was dismissed with costs. Some years after A. filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside; and, on an appeal, this decree was affirmed.

23. A voluntary deed without a power of revocation, and not at all unfair, which the grantor kept by him uncanceled, will not be set aside by a subsequent will (a), for there is no case where it has been so, and a will is no more than voluntary.

A father by settlement grants to his five daughters 4000*l.* a-piece, but to provide against the event of the residue's being of greater value, binds himself in 25,000*l.* to secure the surplus over and above the 20,000*l.* This must be considered in the nature of a bond to the daughters, and will take place against all voluntary claimants (b): otherwise, as to creditors for a valuable consideration

24. Lord Chancellor in this case said, that in making defective executions of deeds in favour of a wife or children, it has never been required that those deeds should be founded on any valuable consideration, in the strict sense of the word; but the deeds being in order to make a provision for a wife or children, has been thought sufficient; and his lordship further said, as this is the general doctrine, so, was it not for the prior deeds that have been in this case, it is one of the strongest that can come before the court for relief, because, for want of a common recovery to dock the entail under the original

ginal settlement in 1679, plaintiff the widow could have no title at law to have the benefit of her jointure, and by that means was absolutely forced to come into equity for relief; and where that is the case, that the whole estate over which the power is executed is merely an equitable estate, there being an absolute volunteer is no objection against the party's having the assistance of the court, to supply the defect of a deed, for the estate being merely an equitable estate, obliges the court to make a determination concerning it; and, where that is the case, the party's being a mere volunteer is no objection to the having a defective execution of a power supplied, which is exercised over such an equitable estate.

has been rightly said by the court, that the husband or father are the proper judges whether the wife or children are sufficiently provided for or not, and the court will not examine whether the provision made was a suitable provision or not, but will leave it to the husband or father to judge when they shall be sufficiently provided for; and was the court to enter into any inquiry of that sort, it must examine into such circumstances of families which would not be fit for them to do.—If the father or husband had said that they are not sufficiently provided for, and had considered them as such, the court had considered them in the same manner; but on the other hand, the court has

considered whether a wife or child has been to all unprovided for, or left in such a condition as is not fit for their state or quality, and has given relief where a sufficient provision has not been made; but has never refused by reason of the excess of it; and though it has been said that no case can be cited for that purpose, yet the *Countess of Oxford's case*, cited in 1 *Chan. Ca.* 264. contradicts that assertion (1). Per Lord Chancellor, P. 1740, in the case of *Harvey and Harvey*, upon a rehearing, *Barn. Rep.* in Ch. 113.

(1) His lordship said he had directed that that decree should be searched for, but the decrees could not be found.

25. If a freeman of London makes a voluntary deed in consideration of love and affection only, and reserves the power over the estate to himself, the property will continue in him, and is subject to the custom.

612. *Fairbaird v. Bowers*, 2 Vern. 202. *Edmundson v. Cox*, 7 Vin. Abr. 202. pl. 11. *Morris v. Buttroughs*, 1 Atk. 399. 2 Atk. 617. *Heron v. Heron*, 2 Atk. 160. and notes.

26. It was said per Master of the Rolls in this case, that where a voluntary conveyance is made by a bankrupt, the court may carry it into execution against the bankrupt, but will not against his assignees; therefore the rule that the assignees of a bankrupt stand in his place does not hold in every case.

28 Oct. 1740, cor. M. R.
Smith v. Fellows,
2 Atk. 61. 377.
Vide City v. City, 2 Lev. 130.
Cotterell v. Cotterell, cor. M. R.
1736. *Hall v. Hall*, 2 Vern.
277. *Turner v. Jennings*, 2 Vern.

10 May 1747, cor. M. R.
Tyrrill v. Hope, 2 Atk. 562.

27. A. who had a power to charge a sum of money on land by deed or will, executed the power by a voluntary deed. The court in favour of the creditors of A. will consider it as personal assets, and lay hold of it for their benefit.

July 1745, cor. Hardw. C.
Pack and others v. Barburst,
3 Atk. 260.
Vide Bainton v. Ward, 2 Atk.
172. and the cases cited in a note
thereto. Et vide *Troughton v.*
Troughton, 3 Atk. 656.

28. Defendant agreed with his uncle for the purchase of a copyhold estate for an inadequate consideration. The uncle intending it as a bounty to him and his family, surrendered to the defendant

11 July 1749, cor. Hardw. C.
Underwood v. Hibcox,
1 Ves. 179, 180.

and his wife and the heirs of their bodies, remainder to his nephew in fee. Plaintiff had agreed with defendant to purchase this estate, and by his bill insisted, that defendant's wife had a voluntary estate given to her by the surrender, contrary to his treaty and agreement with the defendant, and therefore he prayed a specific execution of that agreement, and that the uncle might be considered a trustee for the defendant. *Per cur.*—Every agreement of which there should be a specific execution ought to be in writing, certain and fair in all its parts, and for an adequate consideration. If a voluntary conveyance of an estate without consideration is made (for the benefit of his own family) by one who is indebted at the time of the settlement, or sells it afterwards, it is fraudulent by the statutes of *Eliz.*, which places it in the purchaser for a valuable consideration against the volunteer; and therefore if a person entitled to an estate to himself and his heirs takes a conveyance of the estate, so as to put a right in another, the court will consider it as fraudulent; and upon this kind of equity the court has gone.

As to voluntary Bonds, see *Bonds, Debtor and Creditor.*

——— Agreements, *Agreement, Debtor and Creditor.*

——— Settlements, *Debtor and Creditor, Marriage, Purchaser, Voluntary.*

SEC. 3. Of Deeds obtained by Fraud or Durefs, Circumvention, or Misrepresentation, or from Parties not consant of their Right.

H. 1681, Canc.

Get v. Spencer 1 Vern. 32.

1 Eq. Abr. 170. pl. 4.

Luxford's case, cited.

It is the constant rule in equity to avoid a release where there is *suppressio veri*, or *suggestio falsi*.
Vide Knight v. Cole, 1 Lev. 101.

1. IN this case a release was obtained from one of the parties, who was made to believe he should be compelled to pay costs. The release was set aside by reason of the misapprehension of the party who gave it.

Broderick v. Broderick, 2 Eq. Abr. 430.

M. 1681, cor. Finch, C.
Jervoise v. Duke, 1 Vern. 19, 20.

2. Sir E. D. by will devised a legacy of 2000*l.* to one of his daughters, but if she should marry one Bacon, then the legacy should be void. She married Bacon before her father's death, and having taken advice

advice upon her father's will, was told the legacy was void. Her brother however paid her 800*l.*, and she released the legacy. Afterwards she brought her bill to set aside the release, suggesting that she was circumvented by the misrepresentation of her brother, who had suppressed the will. Lord Chancellor said, it was a rule that where there is *suppressio veri* or *suggestio falsi*, a release shall be avoided; but in this case the father revoked the legacy upon his daughter's disobedience. His lordship confirmed the release.

3. *A.* for 300*l.* granted to the defendant *B.* a rent-charge of 300*l.* *per ann.* out of lands in Ireland of 1000*l.* *per ann.*, to hold to *B.* and his heirs, to commence from the first *Michaelmas* or *Lady-day* after the death of *A.* without issue male, with a proviso, if the said *A.* had any issue male who should attain the age of 21 years, the grant should be void. *A.* died without issue; and on a bill to be relieved against this rent-charge, the court decreed a reconveyance or release thereof, on payment of 300*l.* and interest, it appearing in the cause by proof that *A.* was young and necessitous, and had lived an idle and dissolute life, and that the debaucheries in which *B.* was often a companion with him would soon end his days; that he made this bargain without the advice of any friends or counsel of his own; and that he was utterly incapable of having issue, as appeared by the oaths of his surgeons.

P. 1684, cor North, C. S.
Earl of Ardglass v. Muschamp,
1 Vern. 237.
1 Eq. Abr. 169. pl. 1.

4. A legal conveyance of a contingent remainder was obtained from the plaintiff in this case by fraud. It was contended, that the plaintiff's contingent estate was absolutely destroyed by this conveyance. *Sed per cur.*—That is immaterial; for if the conveyance was obtained by fraud, it was the same (in equity) as if no conveyance had ever been made; and therefore Lord Chancellor declared he would decree for the plaintiff, unless better cause was shewn.

H. 1686, cor. Jeffries, C.
Englefield v. Englefield,
1 Vern. 445.

5. Defendant and his attorney by fraud and misrepresentation obtained from *A.* a conveyance of her estate, and prevailed on her to levy a fine also. No consideration was paid, but friendship was set up as a consideration. Upon a bill by the devisee of *A.*, the court decreed a conveyance of the estate from defendant to the devisee, subject to the debts of the testatrix.

M. 1693, Cane.
Wilkinson v. Brayfield,
Woodhouse v. Brayfield,
2 Vern. 307.

T. 1697, cor. Somers, C. S.
Preston & Ux. v. Wacey & Ux.
 Prac. in Ch. 76.
 2 *Eq. Abr.* 55. c. 1.
Vide S. C. ante, tit. Baron and
 Feme, f. 6. pl. 2. and notes.

M. 1700, cor. M. R.
Jam. v. Oades,
 2 *Vern.* 402.

T. 1701, Canc.
Drew v. Merry,
 1 *Eq. Abr.* 175. pl. 7.

M. 1702, cor. Wright, C. S.
Wood v. Fenwick,
 1 *Eq. Abr.* 169. pl. 2.
 Prac. in Ch. 206.

M. 1705, cor. M. R.
Jennings & al. v. Ward & al.
 2 *Vern.* 520.

6. A feme covert heir at law and her husband (not consultant of their right) being drawn in to execute articles for supplying the defect of a surrender of copyhold lands to the use of a will, whereby they were devised to the plaintiff. The court would not allow the plaintiff to carry these articles into execution by reason of the *fraud* which appeared in this case.

7. Plaintiff being possessed of a reversionary term for 36 years (to commence with the year 1700) of the value of 200*l.* *per ann.* when the estate should fall into possession, in 1683 applied to defendant, a scrivener, to lend him 200*l.* Plaintiff assigned his term to defendant, defeasanced to be void on payment of 40*l.* *per ann.* for 8 years. His Honor said, this was worse than a *Bristol* bargain, and decreed a redemption on payment of 200*l.* with simple interest.

8. *J. S.*, who was to have had a considerable advantage by a will, was drawn in by fraud to make a composition for his interest, and to give a release: afterwards *J. S.* being sensible of the fraud, made his will, and devised (*int. al.*) the residue to his wife, on condition to pay his debts, and made her executrix. Held, that his right to set aside the release was devisable, and the words proper for that purpose.

9. *A.* had an inn in *Newcastle*, which was let at 64*l.* *per annum*, but subject to a small mortgage, and being very poor was inveigled to sell it for 80*l.*; afterwards he brought his bill to be relieved. *Per Lord Keeper*—Though the bargain was not a fair one, yet as it was not attended with strong badges of fraud, there can be no relief against it. Bill dismissed.

10. *A.* lends money to *B.* on a mortgage, and takes a covenant from *B.* by another deed, that if *A.* should think fit, *B.* should convey to *A.* so much of the mortgaged estate as should be of the value of the money lent at 20 years purchase. Covenant decreed to be set aside as unconscionable.

A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

11. Where

§ 3. Obtained by Fraud, Circumvention, &c. D—e 555

11. Where a man under fear enters into an engagement, and afterwards, when at liberty, ratifies the same by a bond and judgment, equity will not relieve him.

T. 1709, cor. Cowper, C.
Goodman v. Sault,
2 Eq. Abr. 183, pl. 2.
Ante, tit. Bond, § 20.

12. A covenant by the husband before marriage to release the wife's guardian within two days after marriage, of all accounts of mesne profits, was set aside in equity, as being extorted from the husband, and in nature of a marriage brokerage contract,

20 May, 1770, cor. Cowper, C.
Duke of Hamilton & Un. v. Lord Hobart,
1 Salt. 158. 1 P. Wms. 121.
1 Eq. Abr. 90, pl. 6.
Vide ante, tit. Agreement, § 7.
pl. 9. S. C. and notes; et *ante*,
tit. Covenant, § 4. pl. 3. S. C.
and Mr. Brown's notes thereon.

13. *F. B.* seized of an estate in fee, devised it to defendant. *F. B.* executed the will, but it was not attested in his presence by three witnesses. *F. B.* died; and defendant, finding that the will was void, for one hundred guineas paid to plaintiff, who was *F. B.*'s heir at law, procured from him a release, which recited that *F. B.* by his last will duly executed had devised his estate to defendant; and defendant, thinking himself not safe with the release only, for fifty guineas more prevailed with the plaintiff to convey the land by lease and release to one *Day*, who was trustee for defendant, to whom *Day* afterwards conveyed. Afterwards defendant, upon a valuable consideration, conveyed part to one *Parker*, who had not any other notice of the invalidity of the will, save that he heard it mentioned in common discourse. Plaintiff brought his bill against said defendant, *Day*, and *Parker*, to have the release, lease and release, delivered up as fraudulently obtained; and it not appearing that the plaintiff, at the time of his making the release, &c. knew that the will was bad, *Harcourt, C.* decreed, that they should be delivered up; and, it not appearing that *Parker* was privy to the fraud, though he had heard of the invalidity of the will as above, it was agreed that he, upon receiving his purchase money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise.

M. 1713, cor. Harcourt, C. S.
Friderick v. Friderick & al.,
4 Vin. Abr. 534, pl. 3.
2 Eq. Abr. 480, pl. 12.
1 P. Wms. 239.

Mr. Viner says, That in this case it was decreed that the defendant do account for the rents and profits of the freehold leases to the plaintiff, and the defendant to have all just allowances for debts and legacies paid by him, and the plaintiff to account for 150 guineas to defendant, with interest, &c. (1).—As to the purchase *bona fide* of part of the freehold lands, he shall convey to the plaintiff upon payment of the purchase money, with interest at 5 per cent. because he had notice of the invalidity of the devise by common report, though not actually notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or got the heir at law to join in the conveyance to him.

* This statement of the case is taken from Vin. Abr. as corresponding more with the register's book than the report of it in P. Wms.

(1) *Vide* *Jervis v. Duke*, 1 Vern. 20. *Pusey v. Desbouvrie*, 3 P. Wms. 315. *Jevers v. Jevers*, 4 Bro. P. C. 199. *Scrope v. Offley*, 4 Bro. P. C. 237. *Meade v. Webb*, 4 Bro. P. C. 497. *Ramsden v. Hylton*, 1 Vek. 304. *Evans v. Llewellyn*, 2 Bro. Ch. Rep. 150.—But for the several grounds on which courts of equity exercise jurisdiction in setting aside deeds, &c. *vide* *Osmond v. Fitzroy*, 3 P. Wms. 129.

14. Where

5 Feb. 1722, Dom. Proc.
White Widow & al. v. Lightburne & Ux. & al.
 2 Bro. P. C. 405.
 13 Vin. Abr. 555. pl. 7.
 21 Vin. Abr. 541. pl. 5.
 2 Eq. Abr. 687. pl. 2.

T. 1723, cor. Macclesfield, C.
Spencer v. Chase,
 9 Mod. 29.

Vide Herne v. Meeres, 1 Vern.
 465. *Chesterfield v. Janson,*
 2 Vef. 125. 1 Atk. 301. *James v. Morgan,* 1 Lev. 111. *Buxton v. Lister,* 3 Atk. 383. *Willis v. Jernegan,* 2 Atk. 251. *Stanhope v. Cope,* 2 Atk. 231. *Baldwin v. Rochford,* 1 Willf. 230. *Barney v. Deale,* 2 Ch. Ca. 136. *Twisselton v. Griffith,* 1 P. Wms. 310. *Clarkson v. Hanway,* 2 P. Wms. 203. *Osmond v. Fitzroy,* 3 P. Wms. 129. *Affley v. Reynolds,* 2 Stra. 915. *Barker v. Vansomer,* 1 Bro. Ch. Ca. 149. *Heathcote v. Paignon,* 2 Bro. Ch. Ca. 167.

T. 1723, cor. Parker, C.
Garrick v. Errington,
 9 Mod. 35.
 2 Eq. Abr. 623. pl. 13.
 Mosf. 8.

(a) *Vide* Hill v. Filkin, 9 Mod.
 154. 10 Mod. 481. 536. 2 P.
 Wms. 6.

M. 1723, cor. M. R.
Clarkson v. Hanway,
 2 P. Wms. 203.
 2 Eq. Abr. 482. pl. 22. 510. pl. 2.
 No proof was offered in this case that any instructions were given by the old man to draw the conveyance, or that the contents of it were ever read to him.
Vide White v. Small, 2 Ch. Ca. 103. *Bennet v. Wade,* 2 Atk. 324. *Evans v. Blood,* 4 Bro. P. C. 557. *Bridgman v. Green,* 2 Vef. 627. *Filmer v. Gott,* 7 Bro. P. C. 70. which are cases of the same nature.

H. 1724, Canc.
Evans v. Hoskins and another,
 9 Mod. 83.
 2 Eq. Abr. 88. pl. 10.
Vide 2 Com. Dig. tit. Chancery, 2. (T.) 11. *Coleby v. Smith,* 1 Vern. 206. *Wilkinson v. Brayfield,* 2 Vern. 307. *Nichols v. Nichols,* 1 Atk. 409. *Cory v. Cory,* 1 Vef. 19. *Oldin v. Sambourn,* 2 Atk. 15. *Young v. Peachy,* 2 Atk. 255. *Kinchant v. Kinchant,* 1 Bro. Ch. Ca. 369. 374. *Evans v. Llewellyn,* 2 Bro. Ch. Ca. 150.

P. 1725, cor. Lds. Comrs.
James v. Greaves,
 2 P. Wms. 270.

14. Where articles and a conveyance are not obtained with the strictest fairness, a court of equity will set the conveyance aside, and order the purchase to stand as a security for the consideration money.

15. If *A.* buy from *B.* a minor, under circumstances of distress, the reversion of a house worth 40 *l.* a-year for 100 *l.*, and sell it again in a few days for 200 *l.*, equity will compel *A.* to account with *B.* for the difference.

16. Persons 18 years old, at the time of making the stat. 11 & 12 W. 3. against papists, are out of the letter of the act, but within the intent and meaning of it; for the law-makers could never intend to put infants of tender years in a worse condition than those who were of age (a). But be that as it will, such persons being heirs at law are proper to make application to Chancery to set aside a conveyance got by fraud from their ancestor.

17. A pauper, 72 years of age, conveyed lands of 40 *l.* per ann. in consideration of an annuity of 20 *l.* for his life. He lived but two years after. Upon a bill by the heir at law this conveyance was set aside at the Rolls, it appearing that the old man was weak, and easily imposed upon, and his Honor's decree was afterwards affirmed by Lord Macclesfield.

18. Where a lease for years worth 200 *l.* per ann. belonged to two co-parceners, and one of them, upon a false suggestion that a fine of 250 *l.* was to be paid for the renewal of it, obtained an assignment of the other's moiety for 20 *l.*, the court set aside this conveyance as fraudulent, and ordered the assignee to account for a moiety of the profits, and defendant to pay costs.

19. It was said by Ld. Com. Jekyll, in this case, that there is a diversity betwixt a deed and a will gained from a weak man, by misrepresentation or

or fraud; for, if a will be obtained from a weak man by false representation, this is not a sufficient reason (a) to set it aside in equity; but where a deed (which is not revocable as a will) is gained from a weak man upon a misrepresentation, and without any valuable consideration, the same ought to be set aside in equity (b).

(a) *Vide* Lord Thanet v. Lord Clare, Bodvill v. Roberts, *accord.*

(b) *Goss v. Tracey*, 1 P. Wms. 287. *contra.*

20. A second brother died, and his eldest and youngest brother consulted a schoolmaster, which of them had a right to his lands; he gave his opinion in favour of the youngest, upon which they agreed to divide the estates. The court set aside the deeds of conveyance of the moiety to the youngest brother, as being obtained by mistake.

T. 1770, cor. King, C.
Lansdown v. Lansdown,
Mof. 364.

21. Equity will not relieve a man against any deed or agreement gained from him when in liquor, merely for *that* reason, in regard this were to encourage drunkenness. *Secus*, if through the management or contrivance of him who gained the deed, &c. the party from whom it was gained was drawn in to drink.

29 May 1734, cor. M. R.
Johnson v. Medicott,
3 P. Wms. 130. n.
Vide Osmond v. Fitzroy, 3 P.
Wms. 129. and notes.

22. The daughter of a freeman of London accepted a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she released accordingly. If the orphanage part be much more than her legacy, though she was told she might elect, yet if she did not know, she had a right to inquire into the value of the personal estate, and the quantum of her orphanage part, before she made her election, this is so material that it may avoid her release. Lord Chancellor did not see any manner of fraud had been made use of in this case, but still it seemed hard that a young woman should suffer for her ignorance of the law or of the custom of London, or that the other side should take advantage of such ignorance. Though it appeared that testator's daughter knew she was bound either to waive her legacy, or to release her right by the custom; and that she might make her election, yet it is hardly probable she knew she was previously entitled to an account of her father's personal estate, which Lord Chancellor said much altered the case. It would give light to this case to ascertain what was the value of the father's personal estate at the time of his death, and what it was at the making of his will; as also to know what the son received for advancement.

T. 1734, cor. Talbot, C.
Pusey v. Desboultrie,
3 P. Wms. 321.
2 Eq. Abr. 270. pl. 24.

advancement in his father's lifetime. His lordship said, Let the plea stand for an answer, saving the benefit till the hearing, and let the defendant the son answer not as to particulars, but by way of computation in gross as to these points.

This cause was ended by compromise.

Vide Reg. Lib. 8 May 1735.
2 *Eq. Abr.* 270, pl. 24. (n.)

18 April 1735, Dom. Proc.
Ivers v. Ivers,
2 *Eq. Abr.* 54, pl. 13.
Gro. & Rud. of Law & Eq. 19.
Ca. 17.
4 *Bro. P. C.* 199. *nominis Jovers*
v. Jovers.

Vide Scrope v. Offley, post.

23. The father on his marriage had articulated to settle his whole estate, but neglecting so to do, when the eldest son of that marriage attained his full age, the father without giving him notice of the articles, and with threats to allow him nothing unless he complied, and on promise to make an absolute settlement on him in case he would comply, prevailed on him to join in making a settlement on the younger children, and thereby to give the father a power to make a jointure on another wife. The father afterwards gave bond to make such jointure, and married. This bond was set aside as against the heirs, and the first articles established, and the second wife put to seek satisfaction of her bond out of the personal estate.

25 Mar. 1736, Dom. Proc.
Scrope Esq. & Ux. v. Offley Esq.
4 *Bro. P. C.* 237.
2 *Eq. Abr.* 54, pl. 14.
Gro. & Rud. of Law & Eq. 19.
Ca. 18.
Vide Ivers v. Ivers, ante.

24. A father by threats compels his son by the first wife to agree to a provision for a second wife and her children in the son's own wrong, and who at the time of the agreement was ignorant of his right. This is a fraud upon the son, and he is not bound to a performance of the agreement.

P. 1736, cor. Hardw. C.
Malden & Ux. and others v. Mennill and others, 2 *Atk.* 8.
So if a releasing party be apprised of his rights, an inadequate consideration will not avoid the deed. *Stevens v. Ld. Bateman*,
1 *Bro. Ch. Ca.* 22. *Cann v. Cann*, 1 *P. Wms.* 727.

25. Where a purchaser has given a full value for an estate, the mistake or ignorance of some of the parties to the conveyance of their claim under a marriage settlement shall not turn to the prejudice of a fair purchaser.

M. 1737, cor. Hardw. C.
Nicholls v. Nicholls, 1 *Atk.* 409.
The statement of this case and decree, as registered in Lib. B. 1737, fo. 508. fully warrant the above conclusion. *Sic* 1 *Roll. Abr.* 687. cites 43 *Ed.* 3. 10.
Wilkinson v. Stafford, 1 *Ves. jun.* 43.
Roy v. Duke of Beaufort, 2 *Atk.* 193. 2 *Ves.* 635.

26. Though a man is arrested by due process at law, yet if he is obliged to execute a conveyance (not under consideration before) whilst under arrest, equity will construe it a duress, and relieve against a deed under such circumstances.

9 Feb. 1740, cor. Hardw. C.
Sir John Barnardiston v. Lin-good, 2 *Atk.* 133. 136.
Barn. 337.

27. *Sir J. B.* remainder-man in tail in the estate in question, being distressed, conveyed two manors of the yearly value of 300*l.* expectant on an estate for life in his uncle *Sir S. B.*, for the sum of 300*l.* only, to the defendant, his heirs and assigns, from and

and after the death of Sir S. B. without heirs male. Sir J. B. brought a bill to be relieved against this bargain, as unconscionable. Lord Hardwicke held it a void conveyance, even in point of law, for as the plaintiff had a remainder in tail only, he could but convey such estate as he had, and not dispose of the inheritance (a).

3 Atk. 278. (a.) *Vide* Lawley v. Hooper, Willis v. Jernegan, 2 Atk. 251.

A person who conveys an estate tail, conveys *tantum statum suum*, which is an estate for life (b); and as the deed in this case only carries an estate for life, it is not such an estate as the parties contracted for, and therefore void (c).

(b) *Vide* Sanders on Uses and Trusts, 427.

In the case of a hard bargain, where it is not absolutely executed but executory only, the constant rule of equity is not to carry it into execution.

(c) *Vide* Brayne v. Deakin in Dom. Proc.

A judgment of 6000*l.* being taken at the time of the purchase, as a security for the performance, Lord Hardwicke directed it should stand as a security for principal, interest, and costs, and no further.

There are all the material ingredients in this case, as well as in those cited (d), to set aside the agreement as a catching bargain against a necessitous and improvident heir.

(d) *Vide* Lord Arglafe v. Mufchamp, 1 Vern. 75. 135. 237. Berney v. Pitt, 2 Vern. 14. Knot v. Johnson, 2 Vern. 27.

What guides the court in all these cases, is the taking the advantage of an heir's being distressed; and such is the principal ground of these decrees.

The court have always extended their relief in such cases, for the sake of the public, to prevent people's gaming, to the prejudice of improvident persons, and the ruin of families. Costs decreed to Sir J. B.

See more of Catching Bargains, *post*. tit. *Heir, Post Obiit*.

28. Z. the father in this case obtained an absolute conveyance from his daughter of her estate, and persuaded her and her husband to suffer a recovery and bar the entail, declaring the uses to one particular purpose; after which he made use of the deeds to another purpose. Equity will relieve in such case under the head of fraud (a). Lord Chancellor said, a court of equity will never suffer a deed of this sort to stand. The case of *Wilkinson v. Brayfield*, 2 Vern. 307. is material to this purpose. His lordship also compared the principal case to *Cotterel v. Purchase*, *ca. temp. Talb.* 64. and *Walker v. Walker*, 2 Atk. 99. (n.) 2. But he said, it was greatly strengthened by the recovery which the father obtained from his daughter, and which ingredient

11 Feb. 1741, cor. *Hardw. C.* *Young v. Peachy*, 2 Atk. 254.

(a) *Vide* Tendril v. Smith, 2 Atk. 85. Heron v. Heron, 2 Atk. 161. Cory v. Cory, 1 Ves. 19. Kinchant v. Kinchant, 1 Bro. Ch. Ca. 369. 374. Hawes v. Wyatt, 3 Bro. Ch. Ca. 156.

ingredient afforded another strong circumstance to relieve the plaintiff, and decreed accordingly.

Note; Lord Chancellor King, in the case of *Gliffon v. Ogden*, refused to give relief on a conveyance obtained by a father from his child in distress, as thinking it a fair bargain between them (a); but the Lords upon an appeal in *March* 1731 laid great weight upon the circumstance of the conveyance being obtained by a father from his daughter when in distress, and reversed the decree.

(a) Lord King said he would not weigh the equality of consideration between father and child in golden scales.

26 Feb. 1741, cor. Hardw. G.
Willis v. Fernigan, 2 Atk. 251.

29. Plaintiff and defendant were concerned in a lottery for the sale of defendant's jewels. Plaintiff agreed to take 11,000 tickets at a stated price, and if he could sell them for more he was to have the surplus. Plaintiff by outstanding his market and demanding an exorbitant premium, became a considerable loser, and then he brought a bill against defendant to be relieved against his bargain as hard and unconscionable. Upon examination of witnesses, nothing appeared to support the allegations in plaintiff's bill. *Per* Lord Chancellor—It is not sufficient to set aside an agreement, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it a hard bargain, if a person will enter into it with his eyes open, equity will not relieve him on that footing only, nor unless fraud in the party contracting with him can be shewn, or some undue means made use of to draw him into the agreement (a), which is not pretended in this case. Bill dismissed with costs.

(a) *Vide* *Chesterfield v. Janson*,
1 Atk. 351. *Nicols v. Gould*,
2 Vef. 421. 518. *Gwyne v.*
Heaton, 1 Bro. Ch. Rep. 9, 10.

Gartside v. Itherwood, 1 Bro. Ch. Ca. 560. *Heathcote v. Paignon*,
2 Bro. Ch. Rep. 167. *Lewis v. Pead*, 1 Vef. jun. 19.

6 June 1741, cor. Hardw. C.
Langley v. Brown, 2 Atk. 202.

30. It is no ground for a court of equity to set aside a deed, that one person had put an unguarded confidence in another.

11 May 1742, cor. Hardw. C.
Sir William Saunderson v. Glasf,
2 Atk. 296.

Vide *Walmesley v. Booth*, 2 Atk.
25. 27. *Drapers' Company v.*
Davis, 2 Atk. 295.

31. The defendant a solicitor made an absolute conveyance to himself of 1000 *l.* from the plaintiff's wife, whilst parted from her husband; the considerations expressed in the deed were for services done and favors shewn. Upon a bill to set aside the deed, as obtained by fraud, suggesting that it was intended as a conveyance in trust for the daughter of the plaintiff by his wife, though the defendant omitted to make any declaration of such trust. Lord Hardwicke, under all circumstances, decreed the deed should stand only as a security for such sum as was justly due to the defendant, and

Vide *Sanders on Uses and*
Trusts, 17, 18.

Vide *Proof v. Hines*, Ca. temp.
Talb, 111.

and that the surplus must be deemed a trust for the daughter, who being dead, it devolves upon the plaintiff as her representative.

32. Plaintiff, as heir at law of Sir *John Lee*, brought his bill to set aside a conveyance made by Sir *John* to defendant, on a suggestion that it was obtained by gross fraud and undue influence. The circumstances of imposition were very glaring: Sir *John* was a weak man, of feeble intellects, almost amounting to idiocy or lunacy, and greatly under the power and influence of defendant *Vade*, to whose daughter Sir *John* was married by a *Fleet* parson, in a state of intoxication and insensibility, insomuch that he knew not of his alliance at the time it was formed. It appeared also that the deed of settlement complained of by the bill was never read or explained to him either in the draft (a) or in the engrossment; that one part only was executed, which was never left with Sir *John* or any body for him, so that he knew not of a power of revocation which was contained in it. On the part of the defendant it was urged, that if Sir *John* was not insane, but only weak, he might do an act that would bind him. *Lord Chancellor* said, that was rightly observed, for there cannot be two rules of judging in law and in equity upon the point of insanity. It remains to consider if Sir *John* had any plain intention to disinherit his heir, and, if he had, whether such intention did not arise from fraud and imposition, and from the undue influence of defendant *Vade* over him. Supposing then that such an intention was owing to fraud and imposition, that would fetch back and revest the estate in the heir; and, if the settlement were out of the case, nobody could have it but the heir. *Lord Chancellor* directed the trustees under the settlement to convey to the plaintiff, with a saving of the interest of Sir *John*'s creditors, under the provision made for them in the deed, if any creditor should appear, and decreed the deed to be delivered up to the plaintiff, together with immediate possession of the estate *, and defendant *Vade* to pay all costs.

Graves, 2 P. Wms. 270. *Bridgman v. Green*, 2 Vef. 627. *Evans v. Blood*, 4 Bro. P. C. 557. *Filmer v. Gotz*, 7 Bro. P. C. 70. *Bates v. Greaves*, 2 Vef. jun. 287.

33. *E.* making *T.* believe that the grant of a stewardship of a manor was so drawn that he might
Vol. II. O o revoke

28 June 1742, cor. Hardw. C.
Bennet v. Vade,
2 Atk. 324. 9 Mod. 312.
See other branches of S. C.
2 Atk. 487. 529.

(a) *Vide Manser's case*, 2 Co. 3.
Thorogood's case, 2 Co. 9.

Vide Top v. Stanhope, 2 Bro. P. C. 180. in which *Lord Hardwicke* said, the power of imposition was not a tenth part so strong.

* *Vide White v. Small*, 2 Ch. Ca. 103. *Clarkson v. Hanway*, 2 P. Wms. 203. *James v.*

2 July 1742, cor. Hardw. C.
Thornbill v. Evans,
2 Atk. 330. 9 Mod. 331.

revoke it at pleasure, whilst *E.* had taken it to himself and his heirs, the court held that *E.* having abused the trust reposed in him, and manifestly intending to get the estate into his own hands, the grant of the stewardship must be given up, and *T.* must have his full costs of suit.

19 April 1744, Dom. Proc.
Meade Bart. v. Webb, Esq.
4 Bro. P. C. 497.

34. Where in a treaty for an agreement, one of the parties wilfully conceals a material fact, in order to keep the other party in ignorance, and to profit by that ignorance; this is a gross fraud, and will in equity set aside the contract.

11 Dec. 1744, cor. Hardw. C.
Attorney-General v. Balliol College,
9 Med. 412.

35. If a conveyance, good at law, is set aside in equity for fraud, and the grantor is obliged to go into equity for redress, he shall not be relieved without doing equity, by allowing to the grantee such lasting improvements as he may have made.

So in the case of turning absolute conveyances into securities for money advanced only.

21 Jan. 1746, Dom. Proc.
Evans v. Blood & al. Administrators,
4 Bro. P. C. 557.

36. *A.* obtained a conveyance from an insane person long before any commission of lunacy issued or was executed. This is a fraud, and the conveyance shall be set aside, though the consideration money was near the value of the estate.

3 July 1747, cor. Hardw. C.
Cory v. Cory, 1 Ves. 19.

37. An agreement, if reasonable, and to settle family disputes, will not be set aside in equity only because one party was drunk, or because paternal authority was exercised, if no unfair advantage was taken.

7 Feb. 1750, cor. M. R. abf. C.
Cory v. Mansfield,
1 Ves. 370.

38. Defendant had been steward to plaintiff's father, after whose death he was appointed receiver of the plaintiff's estate by the court, during his minority, at a stated salary. Upon a bill to set aside a conveyance executed to defendant, after plaintiff came of age, which (as framed) was a conveyance of plaintiff's reversion of some leasehold estates for lives, in consideration of 180*l.* *Per. M. R.*—If the court were satisfied there was an imposition on the plaintiff they would set aside the deed; but the transaction must be presumed fair, unless the contrary appear, of which in this case there is no evidence: there is no ground of fraud charged. But there is another proper head of equity for the consideration of the court, which will hold a strict hand over all deeds executed by young gentlemen just after coming of age, to persons

sons

sons presuming too much on the confidence reposed in them. If defendant's salary had not been sufficient, the court would have increased it; but he contented himself till the plaintiff came of age. No draft was laid before the plaintiff for the perusal of himself or his friends: a blank was left for the consideration money in the deed engrossed; and, although no fraud or misrepresentation appeared, it was imprudent in the defendant not to let some third person peruse the deed on the plaintiff's behalf. The deed contained improper covenants for the plaintiff to execute, even if he knew the contents; and there was a falsity in the material part, which stated that it was a sale for a valuable consideration. Defendant has given up the point, that any money was ever designed to be paid, and has disclaimed a purchase; as plaintiff had declared it should be a gift, defendant had warning enough to frame his deed accordingly. But to go farther; though the deed had not contained that falsity, but had been framed as a bounty, considering the light in which the defendant stood with regard to the plaintiff, his Honor would be inclined to interpose, for fear of the precedent. His Honor would not give his final opinion, until he could ascertain if ever there was an instance of establishing a voluntary deed not at all appearing to tally in every part with the design and nature of the grant, nor importing the truth of the transaction; but here one intended a bounty and the other imprudently framed it so as that against all succeeding to the estate it might appear a sale and grant for a valuable consideration; and, if so, his Honor was inclined to establish it in this case, for he acquitted the defendant of fraud. His Honor laid no weight on the defendant's services during the plaintiff's minority. The smallness of the value induced him to think there was no design to draw in the plaintiff, for, if there had, he would have taken something more valuable than a remote reversion. The *maius* or *minus* however is of no consequence; for, unless some instance could be shewn, his Honor inclined that the deed should be delivered up to be cancelled. On taking further time to consider of the case, his Honor still feared the example, but expressed his desire to support the deed; and he then delivered his opinion, that the deed not being as claimed by the defendant, is not, with regard to the manner in

In *Clarkson v. Hanway*, 2 P. Wms 205. great stress was laid on what appeared to the court on the face of the deed; though in that case there was another circumstance not applicable to this, which would have set that aside.

which it is executed by the plaintiff, proper to stand out in that light against him. If the case could be relieved from that difficulty, it would be hard to set aside the deed from the manner of drawing it. His Honor suggested that the mode to prevent this from remaining such a title out against the plaintiff, would be to dismiss the bill so far as it sought entirely to set aside the deed, and that the defendant should execute a special release to the plaintiff, reciting the whole of the deed, and that it was merely voluntary, and then to decree the defendant to release to the plaintiff all the covenants in the deed (as being improper in a grant of a bounty) which is the middle way between setting it aside and letting it exist totally. Decreed accordingly to be done at the expence of the defendant, but no costs on either side.

6 Nov. 1750, cor. Hardw. C.
Bennett v. Musgrove, 2 Ves. 51.

39. Bill by a judgment creditor having an *elegit* against the defendant's land, to set aside a fraudulent conveyance. Objected, 1st, That plaintiff should go to law, for that a fraudulent conveyance is void by the statute. 2^{dly}, That the plaintiff had not sufficient evidence of fraud. *Per Lord Chancellor*—Where a judgment is obtained, plaintiff is entitled to relief, because that affects the reality of the land. As to the first objection, plaintiff would have failed in an ejectment at law by reason of a special circumstance in this case, though notwithstanding that the conveyance might still be made in fraud of creditors; and if that was done without delivery of possession, such a conveyance would not have been sufficient, though part of the consideration was real (a). However, whether the plaintiff could recover at law or not, he is entitled to go into equity, the distinction there being, where a subsequent purchaser for a valuable consideration would recover the estate, and set aside a preceding voluntary conveyance; if that conveyance was fairly made without actual fraud, the court will say take the remedy at law, but wherever the conveyance is attended with actual fraud, though the plaintiff might go to law by ejectment, and recover possession, he may prefer his bill in equity to set aside the conveyance, which is a distinction between actual and presumed fraud, from its being merely a conveyance. As to the second objection, there being sufficient evidence of a fraudulent and collusive conveyance to deceive the plaintiff and defendant's other

(a) *Vide Twine's case*, 3 Co. 81, in which there was not a delivery.

§ 3. *Obtained by Fraud, Circumvention, &c.* D—e 565

other creditors, the court so far set it aside as fraudulent against the plaintiff's debt by *elegit*.

40. *A.* being a poor man, and weak in his intellects, was prevailed on by *B.* his neighbour to sign a paper, alleged to be an appointment of *B.* as receiver of the rent of a small estate belonging to *A.*, and then let for 20*l.* per ann. on a lease almost expired. This paper afterwards turned out to be an agreement for a lease of the estate to *B.* at only 14*l.* per ann. Soon after *B.* obtained an actual lease from *A.* of this estate, for a term of 41 years, at the yearly rent of 14*l.* in consideration of 5*s.*, a receipt for which was signed and witnessed; but no notice was therein taken of the agreement. Held, that this lease was void, as having been obtained by fraud and imposition.

6th June, 1751, Dom. Proc.
Webb, Esq. v. St. Lawrence and
another, 5 Bro. P. C. 30.

41. A father, by misrepresentation, imposed upon a trustee in a settlement to consent to his execution of a power. On bill brought to set aside the father's appointment, the trustees were admitted to prove the imposition, but the father was not, to clear himself.

8th May, 1755, cor. Hardw. C.
Scroggs v. Scroggs, Amb. 272.

42. No conveyance for a valuable consideration can afterwards be set up as a gift. Many conveyances have been set aside on that ground. The present was a fictitious consideration inserted by desire of grantor himself, yet it was set aside in equity, though found a gift by the jury, and an account was directed.

9th July, 1755, cor. Hardw. C.
Bridgman v. Green, 2 Ves. 627.
Vide S. C. more fully stated
ante tit. Consideration.

43. Where a husband by force, &c. compels his wife to execute a deed of separation, and thereby to accept of a very small maintenance, much inferior to his rank and fortune, a court of equity will relieve the wife against this deed, and refer it to a Master to settle a proper maintenance.

18th May, 1767, Dom. Proc.
Lambert v. Lambert,
6 Bro. P. C. 272.

44. *J. S.* purchased an estate of his aunt for 10,000*l.*, which was proved to be worth 20,000*l.* and upwards; but in the conveyance, the consideration of natural love and affection was added. Held, that this was a gross fraud upon the aunt, and the conveyance was accordingly set aside.

3d Feb. 1774, Dom. Proc.
Filmer, Clerk, and another v. Gitt,
Esq. 7 Bro. P. C. 70.

45. *A.* purchased a reversion worth 1200*l.* for 200*l.*, which he *bonâ fide* paid. Upon a bill to impeach this purchase, it was contended, that the de-

26th Feb. 1776, cor. Bathurst, C.
Bullock v. Sadler, Amb. 764.

pendant ought only to hold the estate as a security for the 200*l.*; but Lord Chancellor said, the question was not whether the consideration was adequate, but whether it was valuable? For if it were such a consideration as would not be deemed fraudulent within the statute of *Elizabeth*, it ought not to be impeached in equity. Bill dismissed without costs.

M. 1778. cor. Thurlow, C.
Stephens v. Lord Bateman,
1 Bro. Ch. Ca. 22.

46. Equity will not set aside a deed entered into by parties apprised of their rights, in order to put an end to a suit, although upon inadequate consideration.

11 Nov. 1783, cor. Lds. Comrs.
Gartside v. Igherwood and others,
1 Bro. Ch. Ca. 558.
Vide Filmer v. Gott,
7 Bro. P. C. 70.

47. Equity will set aside leases for lives, obtained by the agents of a deceased person of weak intellects, upon inadequate considerations, as fraudulent.

P. 1784. cor. Gould, J. abf. C.
Kimbant v. Kimbant,
1 Bro. Ch. Ca. 369.

48. A son, tenant in tail of an estate upon the death of the mother, (who was tenant for life,) made a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's lifetime. The father having derived some benefit under the settlement, a bill was brought by the other children to set it aside, as entered into under undue influence. *Per Gould, J.*—This question is not between the creditors of either party, but between the parties themselves. If the settlement were evidently unreasonable, it would be fraudulent on the face of it, and would afford evidence of improper conduct. This is a strong case of a voluntary settlement by an elder brother for the benefit of the family, and the advice of a father to make such a settlement is to be applauded. A father has an interest in all his children (a), and supposing he had exercised some parental authority, it would not have been sufficient to rescind the transaction (b). If in this case the father did exercise his authority, it was very happily applied. There is no reason to suppose an abuse of power, nor any ground to set the settlement aside. Bill dismissed without costs.

(a) Dict. *per* Glanville, in
Cro. Eliz. 770.

(b) *Vide* Cory v. Cory, 1 Vesf.
29. *Blunden v. Barker*, 1 P.
Wms. 639.

H. 1787, cor. M. R.
Evans v. Llewellyn,
2 Bro. Ch. Ca. 150.
1 Eq. Abr. 24.

49. J. S. seised in tail of lands, devised them to L. in fee. L. aware that the testatrix had not barred the entail, went to E. her eldest brother, on whom he supposed the lands had descended, and told him that the lands were devised to him, but that the purchaser with whom he was in treaty required

quired the heir at law to join in the conveyance, and that he would give him 200*l.* to join. Afterwards *L.* having discovered that the lands were gavelkind, and had descended on the two brothers of *J. S.*, he called on the elder to procure the younger to join also, which he did, and the 200*l.* was divided between them. It appeared that the brothers did not know that the devise to *L.* was void, nor the value of the estate, but that they joined considering it their duty to affirm the devise of their sister. On a discovery of their right, however, they filed the present bill to set aside the conveyance. *Per M. R.*—No case being cited, the present must stand on its own circumstances. There is no evidence of fraud or imposition, but as the offer was suddenly accepted without farther inquiry or information, the conveyance must be set aside as *improvidently* entered into.

50. A conveyance by a woman under any circumstances, and even the moment before marriage, is good *primâ facie*, and bad only if there be fraud, as when made pending the treaty without notice.

3 Mar. 1789, cor. Thurlow, *C. Lady Strathmore v. Bowes*,
3 Ves. jun. 28.
Vide S. C. at large, *ante*,
sec. 1.

51. A deed obtained by fraud or duress is no revocation of a will made prior thereto.

21 July, 1790, cor. Thurlow, *C. Hawes v. Wyatt*,
3 Bro. Cb. Ca. 156.

See Agreement, Bond, Fraud, Heir, Post-Obiit, Seduction.

Deeds in fraud of marriage agreements, *see Marriage.*

SEC. 4. Of Deeds lost, concealed, cancelled, suppressed, or destroyed.

1. **D**EFENDANT in this case demurred, because plaintiff had not made oath of the loss of his deed. *Per cur.*—Where plaintiff prays only a discovery, he need not make such an affidavit as he must if he prays relief; for the jurisdiction cannot be translated without such an oath.

must be annexed to the bill. *Vide Nicholson v. Partison*, 1 Vern. 370. Anon. 1 Vern. 180. Anon. Prec. in Ch. 536. Anon. 3 Atk. 17. *Whitchurch v. Golding*, 2 P. Wms. 541. *Dormer v. Fortescue*, 3 Atk. 132. *Walmesley v. Child*, 1 Ves. 344. *Rootham v. Dawson*, 3 Anstr. 859. *accord.* *Et vide* Anon. 1 Vern. 59. *solut contrariis.* See these cases stated, *ante*, tit. Affidavit, s. 1. Bill, c. 8.

T. 1684, cor. North, C. S. *Gulfray v. Turner*, 1 Vern. 247.

The constant distinction now is, that where a bill is merely for a discovery no affidavit is necessary, but if the plaintiff seeks to change the jurisdiction, by praying relief also, then an affidavit of the loss

2. After a decree of dismissal affirmed on an appeal to the Lords, a bill was brought for a discovery of a deed (said to be burnt pending the appeal)

M. 1686, cor. Jeffries, C. *Barbon v. Searle*, 1 Vern. 416.

which made out the plaintiff's title, and the bill was brought to the end that after such discovery the plaintiff might apply to the House of Lords for relief. On demurrer, the defendant was ordered to answer, but plaintiff to proceed no farther without leave of the court.

M. 1686. cor. M. R.
Hunt v. Matthews, 1 Vern. 408.
 1 Eq. Abr. 59. pl. 5.
 (a) The provision for the children of the first marriage was held to be a good consideration in this case.

P. 1689. cor. Lds. Comrs.
Towers v. Mear, 2 Vern. 98.

T. 1691. Canc.
Brookbank v. Brookbank,
 1 Eq. Abr. 168. pl. 7.

M. 1691, Canc.
Raw & Use. and another v. Potts,
 Prec. in Ch. 35. 2 Vern. 239.
 1 Eq. Abr. 169. pl. 3.
 2 Eq. Abr. 355. pl. 6.
S. C. nomine Raw v. Pole,

3. A widow before her second marriage assigned over several goods to trustees for the benefit of her children by her first husband (a), and the second husband having suppressed this deed, which was made without his privity, and whereby the particulars of the goods would have appeared, he was decreed to pay 800*l.*, which was proved to be the sum mentioned in the deed, and to be the value of the goods.

4. If a lease of lands (by deed) is lost, the lessor may declare on a demise in general, without saying it was a lease in writing. Otherwise of a thing which lies in grant.

5. A. on the marriage of his son settled several lands, viz. as to part, to the use of himself for life, remainder to his son for life, remainder to his first and other sons in tail; and for want of issue, remainder to plaintiff his brother, and his heirs; and as to the other part, to the use of the son for life, remainder to the wife for her jointure, remainder to the first and other sons in tail; and for want of issue, remainder to plaintiff and his heirs. The son and wife died without issue in the life of A. A. then got the settlement and cut it in pieces, but the counterpart was intire in the hands of A., and the bill was brought to discover it and have it preserved. The counterpart being confessed in the answer, plaintiff obtained an order to have it brought into court; and a motion was made to have that order discharged, for that the remainder to plaintiff was merely voluntary, and that therefore he ought not to have any aid in equity; but the court would not discharge the order, but directed the deed to be brought into court, and there remain, to hinder A. from selling the estate from plaintiff.

6. A. was tenant in tail, remainder to B. his brother in tail. A. not knowing of the intail, made a settlement on his wife for life for her jointure, which B., who knew of the intail, and had the deed in his custody, engrossed. After the death of A.,
 B. re-

§ 4. *Lost, concealed, destroyed, &c.*

D—e 569

B. recovered in ejectment against his widow; but the court relieved the widow, by decreeing *B.* to confirm her jointure, and granting a perpetual injunction against the ejectment on account of the fraud of *B.* in concealing the intail, which if it had been disclosed the settlement might have been made good. This decree was afterwards affirmed by the Lords.

7. Defendant suppressed a marriage settlement, by which a remainder in tail male was limited to plaintiff's father, and all the prior estates were spent. Upon proof that the settlement came to defendant's hands, and that he had confessed it in an answer to a former bill, though he now denied it, decreed the plaintiff should hold and enjoy the estate.

6 July, 1700, cor. Wright, C. S.
Eyton v. Eyton, 2 Vern. 380.
 Proc. in Ch. 116.
 1 Eq. Abr. 169. pl. 1.
 13 Vin. Abr. 61. pl. 3.
 100. pl. 11.
 18 Vin. 217. pl. 4.
 2 Eq. Abr. 692. pl. 1.
 Affirmed in Dom. Proc.
 1 Bro. P. C. 151.

The following authorities shew what evidence the court requires in cases where instruments have been lost, suppressed, or destroyed:—*Hampden v. Hampden*, 13 Vin. Abr. 540. pl. 1. 1 Bro. P. C. 250.
 2 Eq. Abr. 286. pl. 1. cited in *Dalston v. Coatsworth*, 1 P. Wms. 733. *Cowper v. Earl Cowper*, 2 P. Wms. 748. *Cookes v. Hellier*, 1 Ves. 235. *Whitfield v. Faufler*, 1 Ves. 389. *Cole v. Gibson*, 1 Ves. 505. *Clavering v. Clavering*, 2 Ves. 233.

8. A settlement under which plaintiffs claimed being lost, but having been proved in Chancery by the plaintiffs themselves *thirty years ago, when they were not concerned in point of interest, though they were since entitled by that deed*; it was ordered, that a copy of the deed should be admitted to be read at law, and also that the plaintiffs' depositions should be read to prove the deed, although *they now claim under it*.

T. 1702, cor. Wright, C. S.
Lady Holcroft v. Smith,
 2 Eq. Abr. 413. pl. 4.
 2 Freem. 259.

9. Defendant by answer confessed he had in a pallion burnt his marriage articles, but it being proved that he produced them after the time he said they were burnt, he was committed; and though he made oath he had them not nor could produce them, yet the court would not discharge him till he consented to admit the articles to be as set forth in the bill.

T. 1706, Canc.
Sanfin & Un. v. Rumley,
 2 Vern. 561.
 1 Eq. Abr. 169. pl. 2.

10. Where there were articles, and in them a covenant, to covenant in the conveyance, that the lands were free from incumbrances, Lord Chancellor *Cowper* said, this is not a covenant that the lands are free, but only that in the conveyance he would covenant so. In the case of such a covenant, if any incumbrance is discovered between the executing the articles and sealing the conveyance or deed of settlement, whereof the party had no notice, that incumbrance

T. 1708, cor. Cowper, C.
Vane v. Lord Bernard,
 Gibb. Eq. Rep. 6.
 2 Eq. Abr. 514. pl. 1.

incumbrance shall be discharged even before the sealing of the deed of settlement, both as the concealment is a fraud, and because it would be needless to enter into a covenant, which, before entering into, is already known to be broken; but against all other incumbrances discovered afterwards, there is the party's covenant only.

6 Feb. 1719, cor. Parker, C.

Butler v. Burk,

18 Vin. Abr. 118. pl. 7.

2 Eq. Abr. 684. pl. 6.

M. 1721, cor. M. R.

Dalston v. Coastworth,

1 P. Wms. 731.

2 Eq. Abr. 287. pl. 3.

13. A purchaser is not to be affected with a concealed conveyance.

14. Bill for relief against the suppression of a deed, by which plaintiff's uncle had settled a term in such manner as that after his and his wife's death (which wife was the defendant) without issue, the same was to come to the plaintiff for the residue of the term. Plaintiff's uncle was dead without issue, and the defendant the wife had burnt the deed. Defendant by answer but faintly denied it, viz. that she did not remember she ever burnt or destroyed the said deed. It was objected by the defendant, that if the limitations of the settlement had been as sworn to by the witnesses, the remainder over to the plaintiff of the trust of the term would have been void at law; and therefore, supposing the deed to have been suppressed, it could not (though admitted) profit the plaintiff, or make him any title. But per M. R.—The term might have been limited over in such a manner as to be good; and his Honor said he would so intend it in the present case, for every thing must be presumed in *odium spoliatoris*. His Honor then, considering in what manner he should pronounce his decree, cited *Rex and Lord Hunsdon v. Co. of Arundel* (a), *Sanfon v. Rumsey* (b), *Hampden v. Hampden* (c), and *Woodroff v. Burton*, in February 1719, in which last mentioned case a devisee brought his bill against the heir; and, it being made to appear that there was such a will as the plaintiff had suggested, and that the defendants had destroyed it, Lord Chancellor Parker decreed the defendant to convey the premises to the plaintiff in fee, and to deliver up the possession, which his Honor said seemed to be the most effectual and reasonable decree. But in the principal case the court said, there could be no decree for the possession, nor any present conveyance to the plaintiff, it appearing that the remainder of the term was only limited to the plaintiff after

(a) Hob. 109. cited also in *Cowper v. Cowper*, 2 P. Wms. 720 and there stated more particularly from the Register Book, (T. 1616, B. 1095.); the decree runs, "That the king and Lord Hunsdon, his former should hold and enjoy until the defendant produced the deeds mentioned and proved once to have been extant and duly executed."

(b) 2 Vern. 561. where defendant article to give a marriage portion to his daughter, and afterwards burnt the articles, all which being made to appear defendant was committed, and continued in confinement till he had admitted the articles to be as stated in the bill, which commitment was by interlocutory order, and the cause was never heard.

(c) 13 Vin. Abr. 540. Ca. 1. 2 Bro. P. C. 250. 2 Eq. Abr.

after the death of the defendant. His Honor decreed, however, that defendant do assign over the term to trustees, in trust for herself for life, and afterwards for the plaintiff, and that she should bring the title deeds into court and pay costs.

286. pl. 1. where defendant had suppressed his father's will under which the plaintiff claimed; it was proved there was such a will, but no exact account was given of the contents thereof, which the defendant might have cleared by

producing the will. Decreed therefore, that the plaintiff, the devisee, should hold and enjoy till the defendant produced the will, which decree was afterwards affirmed by the Lord Chancellor, and finally, by the Lords.

From the several cited cases, therefore, as well as from the case of Woodroff and Burton, and the principal case, it appears, that formerly, where an heir suppressed a deed, the court decreed the party claiming to hold against the suppressor; but now the court goes farther, and decrees the suppressor to convey.

15. A parol agreement being confessed in the answer, shall be executed, though not in writing. The agreement in this case was originally in writing, but was lost.

H. 1724. Canc.
Hofier v. Read, 9 Mod. 86.
Vide S. C. ante, tit. Agreement, f. 5. pl. 37. and notes.

16. A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted, and recited in the condition of the bond.

H. 1724, cor. Lds. Comrs.
Anon. Gibb. Eq. Rep. 183.
2 *Eq. Abr.* 413, pl. 9.

17. *A.* contracted with *B.* to sell him a house in *Middlesex*, which was settled by his marriage articles; but not performing his contract, and availing himself of the want of registry of such articles, the court decreed him to pay all costs for the fraud in concealing the deed.

M. 1727. cor. King, C.
Beatiss v. Smith,
3 *P. Wms.* 347.

18. In a bill purely for the discovery of a deed, or to have it delivered up, there is no need of annexing an affidavit that the deed is lost. *Secus*, if relief be prayed generally as to recover the money on a bond.

T. 1727, cor. King, C.
Whitcomb v. Golding,
2 *P. Wms.* 541.
1 *Eq. Abr.* 14 pl. 4.
Vide *Godfrey v. Turner*, 1
Vern. 247. et ante, with notes.

19. Where a defendant has concealed the deeds, making out the plaintiff's title, he shall account for the profits, not from the filing of the bill only, but from the time the plaintiff's title accrued.

M. 1731, cor. King, C.
Benet v. Whithead,
3 *P. Wms.* 645.
2 *Eq. Abr.* 7. pl. 17. 588. pl. 3.
Vide *Dormer v. Fortescue*, 3
Atk. 124. *Townsend v. Ash*, 3 Atk. 34.

20. Where there is a subsequent mortgagee without notice, who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him without paying him his mortgage money.

P. 1734, cor. Talbot, C.
Head v. Egerton,
3 *P. Wms.* 280, 1.

It seems necessary to make out a case of fraud or gross negligence to postpone a first mortgage. Vide *Peter v. Russell*, 1 *Eq. Abr.* 321. pl. 7. *Gillespy v. Courts*, Amb. 652. *Tourie v. Rand*, 2 Bro. Ch. Rep. 650. *Plumb v. Fluit*, in Scacc. 1791. *Mocatta v. Murgatroyd*, 1 *P. Wms.* 393.

The first mortgagee permits the mortgagor to keep the title deeds; and the mortgagor, shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first

first mortgagee is accessory to the drawing in of the second.

T. 1733, cor. Talbot, C.
Tanner v. Wise,
 3 P. Wms. 296.
Ca. temp. Talb. 284.
 2 Eq. Abr. 304. pt. 27.

M. 1734, cor. Jekyll, M. R.
Cowper v. Earl of Cowper,
 2 P. Wms. 746.

Fide Dalton v. Coatsworth,
 1 P. W. 732.

(a) Hob. 109. cor. Lord Ellesmere, assisted by the two Chief Justices and M. R.

(b) T. 14 Jac. 1. lib. B. fo. 1095. though in Hob. 109. the decree is said to be "that the king and his farmer should hold and enjoy till defendants should produce the deeds, and the court take further consideration and order."

21. It is but a slight equity for an heir to say he wants the writings of his ancestor, unless he claims under some deed of entail concealed from him by his ancestor's devisee.

22. It appeared in evidence in this case, that S. C., one of the executors of testator's will, had possessed himself of testator's papers, without the participation of his co-executor, and had burnt or destroyed such of them as he thought fit. Sir Joseph Jekyll said, this is a fact of such a nature, that it ought to be thoroughly weighed, not merely with regard to the present cause, but as it concerns property in general and public justice. It further appeared, that applications were made to S. C. on behalf of testator's widow, desiring that she or some person for her might be present at the opening of the testator's papers, which the executor declined, saying that there were private papers not fit to be seen. Upon this evidence, and the known maxim *omnia presumuntur inodium spoliatoris*, it was insisted two presumptions arose; first, that S. C. the executor had executed some deed to the testator (his brother) whereby his title to the lands contested for was conveyed or released; and, secondly, that such deed was by him burnt or destroyed. Per M. R.—Before this evidence is considered, it must be premised, that these presumptions go farther than any court of law or equity has gone in any case of suppressing or destroying evidence. In *Rex and Co. of Arundel* (a), Lord Hobart says, the bill affirmed the king's title to be by attainder of Francis Dacres, who was seised of an estate tail; but the deeds whereby the estate was come to him were not extant, but very vehemently suspected to have been suppressed by some under whom defendants claimed, therefore the decree (as appears by the registrar's (b) book) ran thus: "that the king and his heirs, and Lord Hunsden, his farmer, should hold and enjoy until the defendant produced the deeds therein particularly mentioned, and proved once to have been extant and duly executed." By the printed report of this cited case the deeds are *supposed* but not *said* to be proved. Hence it seems the existence of the deeds was fundamental to the decree, and the proof of them fully expressed in framing the

§ 4. *Lost, concealed, destroyed, &c.*

D—e 573

the decree. In *Gartside v. Ratcliffe* (c) the deed burnt or cancelled was proved. In *Hunt v. Matthews* (d) the deed suppressed was proved; and in *Wardour v. Beresford* (e) (as appears by the registrar's book, P. 1687. fo. 491.) "the Lord Chancellor, " on reading and examining witnesses *viva voce*, " declared, that the papers were through the " carelessness of the defendant embezzled, and " therefore he confirmed the Master's report, " which had not made the defendant any allowance for diet, &c. by reason of such embezzlement." Here, by the proof of the embezzlement of the papers, it seems that there were such papers. The case of *Co. of Plymouth v. Bladen* (f) appears by the registrar's book to be a bill by plaintiff for an account against defendant, her steward, whom she had imprisoned; and, upon promise of his liberty, had got a trunk in which were all his vouchers, insisting, that though he kept the key, yet it was easily to be opened, and that it was to be presumed it had been so; and it was impossible for him to prove what the plaintiff had taken out, or to account without his vouchers: this plea was argued, and ordered to stand for an answer. Afterwards, by an interlocutory order, the trunk was directed to be delivered to the usher of the court; and, upon hearing the cause, the Lords Commissioners decreed the defendant to account, and ordered the trunk to be brought before the Master, who was to open it in the presence of both parties, and they to have copies of the papers found in it: in this case the court would not presume material papers, or even a suppression of any such, though it should seem the trunk was got at by the plaintiff in a very unwarrantable manner, and only took the best care they could that the papers, whatever they were, should be produced. His Honor said, there had been no cases at law, and that he had cited all the material ones in equity; but, though there might have been others which he could not remember, yet he did not believe there had been any one where there was not some proof made of the existence of the deed supposed to be suppressed or destroyed (g). His Honor then proceeded to consider the manner and circumstances of the executor's possessing himself of and destroying the writings of the testator in the principal case, in order to see whether they afford a sufficient presumption that there was such a deed or writing, and that

(c) 1 Ch. Ca. 292.

(d) 1 Vern. 408.

(e) 1 Vern. 452. but not rightly reported there.

(f) 1 Vern. 329.

(g) *Sic*, *Saltern v. Melhuish*, Amb. 249. in which case Lord Hardw. lays it down as a principle, that where the contents of a deed destroyed are proved, the party shall have the same benefit as if the deed itself was produced.

that S. C. (the executor) did burn or destroy it. Although each executor, having the whole office in him, has authority to do what S. C. did, yet he ought to have stayed for his co-executor; but then it does not appear that his co-executor when he came took upon him to act in any manner, or so much as to enquire concerning his testator's papers, or any of his affairs; and indeed he might reasonably think S. C., whom he found in testator's house, had taken some care about his affairs; and probably he might think, S. C. being testator's brother, and one who had no interest in his estate (that he knew of at that time), was more proper to look into bureaus or cabinets, and inspect papers, than he was; and, it appears from the evidence before the court, that he did think so. Again, if S. C. had executed such a deed of release, and had intended to suppress or destroy it, he would have taken a clandestine way for that purpose, as the suppression of deeds does in its nature suppose, and not have burnt papers and writings at several times in an open public manner. His Honor declared, that had there been the least positive proof of a release from S. C., he would totally dismiss his bill; but, when such release or conveyance is only supposed or inferred from appearances, out of which that supposition does not necessarily or even naturally arise, his Honor could not but think the title of S. C. was subsisting. The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue (b).

(b) Though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum qui leges juraque servat*; and it is said in Rook's Ca. 5 Rep. 99. that discretion is a science not to act arbitrarily according to men's wills and private affections.

The discretion executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly, in others assists it and advances the remedy; in others again it relieves against the abuse or allays the rigour of it; but in no cases does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to the court. That is a discretionary power, which not even the highest court acting in a judicial capacity is by the constitution entrusted with.

§ 4. *Lost, concealed, destroyed, &c.*

D—e 575

21. If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond; but there must be some deed to revert the estate in the mortgagor.

25 Nov. 1738, cor. Hardw. C.
Harrison v. Owen,
1 Atk. 520.

22. A mortgage and an assignment of a mortgage were put into defendant *B.*'s hands, to receive the principal and interest, who pawned them to the defendant *S.* for 100*l.* Lord *Hardwicke* held, that as the pawner must by the deeds appear to have no property, he could not avoid decreeing *S.* to deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law against *B.*

24 May, 1742, cor. Hardw. C.
Jackson v. Butler and others,
2 Atk. 306. 9 Mod. 297.
Vide 1 Eq. Abr. 129. 167. 310.
Vide Grey v. Cockerill,
2 Atk. 114.

Lord Chancellor said, it was proper to prefer a bill in equity for the recovery of deeds in such case, for in trover the plaintiff could not have the deeds themselves, but only damages for the detainer.

23. Bill for a discovery of title deeds, and for relief also. Demurrer, for want of an affidavit that plaintiff had not the deeds in his custody, allowed upon the constant course of the court.

17 Dec. 1743, cor. Hardw. C.
Anon. 3 Atk. 17.
Vide Walmesley v. Child, *ante*,
tit. Bill, f. 8. pl. 80.

24. A purchaser made an objection to a title for want of a deed, which had been inrolled at a public office, but could not be found. A copy of it, taken in 1632, attested to be a true copy by five witnesses, was produced in court. Lord *Hardwicke* was of opinion this would have been sufficient, even without an attestation. *Sed fecus*, if the original deed had been in the hands of a private person.

14 April, 1743, cor. Hardw. C.
Harvey v. Philips,
2 Atk. 541.
Vide Medicot v. Joiner, 1
Mod. 4. and *Anon.* 6 Mod. 225.
and Mayo v. Combe, Hardr. 119.
1 Lev. 25. 3 Keb. 477. there
cited, *et vide etiam* Lady Holcroft
v. Smith, 2 Freem. 259, 260.

25. Though evidence may be given at law of a deed that is lost, it is otherwise as to a bond, for a *profert in curia* must be made of it.

11 March 1744, cor. Hardw. C.
Snellgrove v. Bailey,
3 Atk. 214.
Vide *Anon.* 2 Atk. 61. (n. 1.)
Contra Totty v. Nesbitt, 3 Term Rep. B. R. 153. in a note.

26. The settlement in this case was by lease and release, and it was objected, that it was defective by reason of the loss of the lease for a year. *Sed per cur.*—That does not at all affect the substance of the case, and a consideration being proved though the lease is missing, the release will amount to a covenant to stand seised (*a*).

25 Oct. 1744, cor. Hardw. C.
Brown v. Jones & al.
1 Atk. 190, 191.

secondary consideration will not raise an use, by way of covenant, to stand seised. (*a*) i. e. a consideration of marriage or blood, for a pecuniary consideration. *Vide* Sanders on Uses and Trusts, 558.

27. It was insisted in this case, that a surrender of a copyhold estate to the use of a will ought to be

3 May 1749, cor. Hardw. C.
Cookes v. Hellier,
1 Ves. 235.

(a). *Vide* Lord Hunsden's case in Hob. and many subsequent cases.

10 Feb. 1750, cor. Hardw. C.
Whitfield v. Fausset,
 1 Ves. 389.

be presumed, having been lost at the time the court rolls were burnt. But *per* Lord Chancellor—The presumption that the surrender was lost from the court rolls being burnt, is mere matter of law, nor will equity go upon presumption of evidence any more than a court of law, although if deeds are destroyed by a party who would take the benefit of them, a court of equity will go farther than a court of law *in odium spoliatoris* (a). But if the destruction be casual, the evidence is the same in law and equity.

28. A deed (or record) lost may be proved by circumstances, so far as they may be given in evidence to a jury, for in point of *profert* it is another thing. But for this the law requires a proper foundation to be laid, and two things are necessary, first, to prove that such a deed once existed, for an answer admitting that such a deed did once exist to a certain intent, is not to be relied upon as evidence of all the uses of the deed, but as an admission only that such a deed, and uses something of that nature had existed. The next step is to shew some ground that the deed is lost, or being in the adversary's hands cannot be come at. In the principal case there was sufficient evidence to trace the lost deed into the hands of the defendant, who was the purchaser of a rent charge issuing out of estate in question, and had himself produced the lease for a year, which is a part of the conveyance. This Lord Hardwicke said was a foundation to let the plaintiff read his draft, which was strongly proved. His lordship further observed, that before he pronounced his decree, he would be satisfied of the new practice stated, *viz.* that a person may declare or avow upon a deed of which he ought to make *profert*, setting forth that it is lost, for if so there is no need to go into equity upon a lost bond, since it may be declared upon, which would make a great alteration in the proceedings in equity.

Upon pronouncing the decree (on the 20th Feb. following) Lord Hardwicke said, the loss of a deed is not always a ground for a plaintiff to come into a court of equity for relief, for if there is no more in the case, although he is entitled to have a discovery of that whether lost or not, courts of law admit evidence of the loss of a deed proving the existence of it, and the contents just the same as a court of equity. There are two grounds to apply to equity for relief, annexing an affidavit to the bill: first,

where

where the deed is destroyed or concealed by the defendant; and whenever that is the case, the plaintiff is entitled in equity to relief, upon the reason in Lord *Hunsdon's* case (a). Another is, where the plaintiff cannot recover at law without making *profert* of the deed in pleading. If a man has lost a bond, he is entitled to go into equity, not only for a discovery, but to have a decree for payment; because he cannot declare without making *profert*, the defendant being entitled to *oyer*. In *Bloodwin v. Osborn*, T. 22 Geo. 2. in an action of covenant for rent in arrear, there was a long title to the rent created in 1656 set forth, and then a dereignment to the title to the rent brought down in the declaration, and all the material deeds were set forth to be accidentally destroyed by fire; to this the defendant pleaded two pleas, which were two issues on the title: they were tried before *Birch*, J. in 1748, and there was a verdict for the plaintiff: the defendant took issue, so that it was too late to take advantage of it, for it should have been demurred to with special cause and shewn. As to the case of *R. v. Hayes* in B. R., in *quare impedit*, that not being determined, his lordship would not (if it depended upon that) send a plaintiff to law who went into court on a plain equity, frequently admitted on a lost deed, to try his chance, whether the judges would establish this pleading. The judges indeed ought to be *asuti*; but the allowing this in pleading will put the plaintiff or defendant in *replevin* under great difficulty, which is to be considered in letting such new inventions into pleading, his lordship therefore would not countenance it before it had been established by the judges. The only case having a tendency to the principal case is *Carver v. Pinckney* (b), where the court held a declaration good *quod* defendant *pener se habet*, without shewing the indenture; but there was a special reason which is not in this case, *viz.* the 29 Car. 2. of augmentation, expressly enabling the vicar, &c. to take a distress or bring an action of debt: the opinion of the court in that case was, that the plaintiff was enabled to sue by the statute, and might excuse *profert*. But his lordship went not on that ground; he thought the plaintiff in the principal case might sue without *profert**, in the names of the owners of the rent charge, which he had bought of them, and that they were to be considered as his trustees. The conveyance was

(a) Hob. 109.

(b) 3 Lev. 32.

* The principal question in this case was, What relief in equity the plaintiff could have, as purchaser of an equitable title to a rent-charge, against defendant,

as the owner of the land, the deed creating the rent-charge being lost or concealed by defendant?

(c) *Vide* Dy. 277. pl. 58. *Estoff's case*, Cro. Jac. 217. Lord Huntingdon v. Mildmay, Cro. Car. 441. Stockman v. Hampton. Reynel v. Long, Carth. 315. which are authorities that in pleading a deed under the stat. of uses it need not be set out with *profert in cur.* because the deed belongs to the grantee to uses, and he has no remedy to recover at law. So is *Noy*, 145.

(d) 10 Co. 92.

Mr. Attorney-General observed he had heard Lord King say, that if a person pleaded a declaration with a *profert*, and afterwards was not able to produce it; upon affidavit of its being lost he would relieve him on motion: to which Lord Hardw. replied, he could not conceive what Lord King meant, for that would be a plain error on the record.

11 Mar. 1751, cor. M. R. abf. C.

Clawering v. Clawering, 2 Ves. 233.

on the statute of uses, and the owners of the rent abstracted from the statute had no right to the possession of the deed or counterpart, which had been judged a reason to excuse the plaintiff in *debt* or *covenant*, or the *avowant* in *replevin*, from producing the deed in court, and might plead it without *profert* (c). But though it is clearly established, that in pleading a deed under the statute of uses no *profert* need be set out; it is (when considered) but a *spungy* reason; there is a better. The owner of a rent-charge is not entitled to the charters which belong to the owner of the land, and that falls within the reason of *Carver v. Pinckney*. As the plaintiff will not be under this difficulty in pleading, he is not entitled to come into equity for want of a deed to change the jurisdiction for that cause; but still he is entitled to a decree, first, for a further assurance against the owners of the rent charge; and next, to make use of their names in distraining for the arrears. But no attornment is necessary in a conveyance on the statute of uses; and, if the further assurance be executed before distress or action brought, so that the legal estate will by such conveyance be out of the owners of the rent charge, the owner of the land shall not set it up or take advantage of it. This is a very considerable question at law, for by this method defendant may be driven to very disadvantageous issues. The inconveniences are clearly stated in *Layfield's case* (d). Lord H. however would give no opinion, it being for the judgment of a court of law; had it been material, his lordship would have cited *Souversby v. Sparrow*, B. R. 16 Geo. 2., where, upon application to dispense with *profert*, because of the inability to give oyer, the court would not do it, for the plaintiff should not have brought his action before he had the deed; and it was not like the cases where the court could help by imparlances. So in *White v. Montgomery*, M. 17 Geo. 2. in debt on bond plaintiff said he could not make *profert*, the bond being in the hands of a stranger; yet the court would not excuse the want of oyer.

29. On a bill to supply the loss of a deed charged to be in defendant's hands, though a strong case for making an immediate decree, yet a trial at law must be directed, if defendant insists on it, there being the same rule of evidence at law and in equity

equity on the loss of a deed; nor is it necessary to order that the depositions of the witnesses should be read at law, for courts of law always read them.

30. The trusts of a settlement made after marriage were to raise portions for daughters on failure of issue male, to whom an estate was limited in tail. There was issue male one son, to whom one of the daughters had given a general release, not knowing of the settlement, for it did not appear that the settlement was discovered or known in the family till after the death of the son, when it was found among his grandmother's papers. Decreed, the portions to be raised after the failure, notwithstanding the release.

17 June 1751, cor. Hardw. C.
Ramsden v. Hylton,
Hylton v. Bisce, 2 Ves. 305.

31. Plaintiff, in order to prove the contents of a deed charged to have been destroyed or lost, produced a deed ingrossed but not executed, and which was proved to be a copy of the deed lost. Objected, that the evidence of the destruction was not sufficient. *Lord Chancellor* thought the deed ought to be read. The rules by which evidence (even parol) may be given of the contents of a deed upon sufficient grounds, are,

10 Dec. 1754, cor. Hardw. C.
Saltern v. Melbuis,
Ambl. 247.

1st, To shew that the deed is in the hands of the opposite party, and that he does not produce it after notice.

2^d, To give a reasonable account of the loss or destruction of the deed. By the rule of law, the best evidence must be given which the nature of the case will admit, which rule in no case is construed with greater latitude than in cases of this sort.

In the principal case there was strong evidence that the deed did exist, and of the contents of it. Evidence of loss or destruction generally depends on circumstances, and it is seldom that positive proof can be had; but it was proved in this cause that the deed was burnt. And *Lord Chancellor* further said, that though all cases of spoliation come in a favourable light before the court, yet notwithstanding the rule that things are to be taken *in odium spoliatoris*, it ought to have no other consequence than that where the contents of a deed destroyed are proved, the party shall have the same benefit as if the deed were produced. And this his lordship laid down as a principle.

Medlicot v. Joiner, 1 Mod. 4.
was said at the bar to be the first case where evidence of the contents of a deed was admitted; and *Dr. Leyfield's case*, 6 Co. 33. was cited to shew with what caution such evidence should be admitted.

6 March 1755, cor. Hardw. C.
Birch v. Algrave,
 Amb. 264.

Fide Ward v. Lant, Prec. in
 Ch. 182., which, in principle, is
 material to the present case.

6 March 1758, Dom. Proc.
*Delany (Dean of Down) v. Te-
 nison & al.*
 5 Bro. P. C. 300.

10 March 1777, Dom. Proc.
Healey v. Copley, Esq; & al.
 7 Bro. P. C. 500.

T. 1788, cor. Buller, J. abf. C.
Lady Strathmore v. Bowes,
 2 Bro. Ch. Ca. 345.
 3 Ves. jun. 28. 1 Eq. Abr. 59.
 See the event of this cause and
 the state of it more at large, *ante*,
 tit. Baron and Feme, f. 5. and
 tit. Deeds, f. 1.

(a) *Vide Carleton v. Earl of
 Dorset*, 2 Vern. 17. and *Ed-
 monds v. Donington*, there cited.
King v. Cotton, 2 P. Wms. 674.

32. *W. P.* made a secret conveyance of several
 estates to his daughter, to whom he had given a
 portion on her marriage, and she was jointured.
 The father kept possession of the estates and of the
 title deeds also, and afterwards devised these estates
 by will. It appeared in evidence, that the father
 made the conveyance to disqualify himself from
 serving the office of sheriff of *London*, by reducing
 his estate under the value of 15,000 *l.*, but after-
 wards he changed his mind and paid the fine.
 Upon a bill by the plaintiffs as devisees against the
 heir at law of the daughter, Lord Chancellor said,
 these sort of cases stand on their own circumstances.
 All considerations of fraud and trust must be laid
 aside in this case. *W. P.* was mistaken, and he
 knew it when he made his will, for though he
 meant to disqualify himself by parting with the
 legal estate, he meant to reserve a beneficial inter-
 est; he therefore received the rents, and he sold
 part of the estates. The conveyance by *W. P.*
 ought not to take effect against his intention, un-
 less he had actually excused himself by taking the
 oath, which would have been against conscience,
 and in fraud of the local law of *London*. Held,
 that the will passed the trust, and that the heirs of
 the daughter should convey the legal estate to the
 plaintiffs.

33. The wilful concealment or destruction of a
 deed, is a fraud upon the parties interested; and
 therefore every thing shall be presumed in their
 favor against the person guilty of the fraud.

34. Where a will recites and refers to a volun-
 tary deed, which cannot, after the testator's death,
 be found, this reference and recital will establish
 it; and it will be considered as incorporated with,
 and constituting part of the will,

35. Lady *S.* was a widow, and apparently in
 possession of large estates, *B.* married her as *bona
 fide* in possession. After the marriage it appeared
 she had previously made a settlement of her estates,
 without the knowledge of *B.*, to deprive him of
 his marital rights. Upon the cases cited (a), it
 was admitted as an established principle, that a
 widow cannot for general purposes make a secret
 conveyance to defeat the rights of her second hus-
 band, of which he is a purchaser of the highest
 consideration in law.

36. Though

36. Though a court will permit a plaintiff to declare upon a lost bond, that does not oust the court of Chancery of its concurrent jurisdiction.

H. 1797, cor. Thurlow, C.
Atkinson v. Leonard,
3 Bro. Ch. Ca. 218.
Vide Totter and Nesbitt, in B. R.
cited in 3 Term Rep. 153. n.

SEC. 5. In what Cases the Court will order Deeds to be delivered up or brought into Court for Inspection.

1. **EQUITY** will oblige a tenant for life to deliver deeds to the heir confirming the life estate; but, if there are any mesne remainders in tail, as long as there is a possibility of issue, the court will not order them to be taken out of the hands of the tenant for life.

Term and year unknown.
Joy v. Joy, MS. Rep.
2 Eq. Abr. 284. pl. 4.

2. If deeds are deposited with *A.* by mortgagor and mortgagee, before the condition broken; *A.* is trustee for the mortgagor, afterwards for the mortgagee; and, if *A.* deliver them to the mortgagee, equity will not decree them to be delivered to the mortgagor.

Term and year unknown.
Anon. MS. Rep.
2 Eq. Abr. 284. pl. 3.

3. If an heir at law brings a bill for deeds and writings against the widow of his ancestor, he must establish her jointure, though it was made after the marriage, and not pursuant to any marriage articles, but purely voluntary.

M. 1687, cor. Jeffries, C.
Towers v. Davys, 1 Vern. 479.
1 Eq. Abr. 168. pl. 3.
Vide 2 Ch. Ca. 4.

4. The plaintiff was a remainder-man in tail in a voluntary settlement, and the bill was for a discovery of the deed; but it appearing to the court that the entail was discontinued, the court would not relieve the plaintiff.

H. 1688, Canc.
Kelly v. Berry, 2 Vern. 35.
1 Eq. Abr. 167. pl. 1.

5. Bill for a discovery, whether in a mortgage made by *A.* to *B.*, which had been assigned to the defendant, there was not some trust for the benefit of the plaintiff. Defendant by answer denied there was any trust declared for the plaintiff. The answer being replied to, the question at the hearing was, Whether the defendant was obliged to produce the deed? The court would not compel the defendant to produce the deed, saying, that by this method all purchasers may be blown up.

M. 1704, cor. Wright, C. S.
Hall v. Atkinson and another,
2 Vern. 463.
1 Eq. Abr. 5. pl. 5.
To this decision the reporter
adds, Quære tamen?

6. If a deed is made of an estate with a power of revocation, and after it is revoked, he to whom the inheritance belongs may by bill compel such

P. 1705, Canc.
Anon. Gilb. Eq. Rep. 1.
2 Eq. Abr. 284. pl. 1.

deed to be delivered up to him to be cancelled; because the deed of revocation may be lost, and then it is unreasonable the other deed should be standing out.

M. 1720, cor. M. R.
Opie v. Godolpin,
Proc. in Ch. 548.
 2 *Eq. Abr.* 284. pl. 2.

7. J. S. lent money on a bad security, which his lawyer advised him was a good one; if it prove otherwise, and he has notice that another made title to it, he must deliver up all the writings except the mortgage deed, for there may be a covenant in that for payment of the mortgage money.

T. 1723, cor. Macclésfield, C.
Earl of Suffolk v. Howard,
 2 *P. Wms.* 177.
 2 *Eq. Abr.* 285. pl. 1.
Vide Sir Ed. Battison v. Far-
ington, 3 *P. Wms.* 363.

8. A peer disinherited by his ancestor is entitled to the favor of the court; and, on bill and answer to have the family deeds brought before the Master, in order to see whether any thing can be discovered to his advantage,

Lord Chancellor said, it was ingratitude to the crown for a peer to devise away the estate from the honor.

H. 1725, cor. King, C.
Reeves v. Reeves,
 9 *Mod.* 128. 132.
 2 *Eq. Abr.* 285. pl. 2.
 161. pl. 11.

9. A bill to *compel trustees to enter to preserve contingent remainders*, is of the first impression, for their title is merely at law; but every *remainderman* hath a right to come into a court of equity, and pray the aid thereof, to compel persons to bring into court the deeds and evidences relating to the estate.

23 Mar. 1725, Dom. Proc.
Rous Bart. v. Parker & al.
 3 *Bro. P. C.* 180.

10. On a bill by the lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, an issue was directed to try what copyhold lands were in the possession of the defendant. But, on an appeal, this decree was reversed, and a commission of enquiry directed, with a previous inspection of all deeds, &c.

M. 1725, Canc.
Floyer v. Sydenham, 9 *Mod.* 99.
Sol. Ca. in Ch. 2.
 2 *Eq. Abr.* 377. pl. 7.
 2 *Ch. Ca.* 4.

11. Bill by one of the co-heirs of A., claiming a moiety of an estate under the settlement of his grandfather, against which claim defendant set up the will of A. in his favor, and insisted he was not obliged to produce the settlement until the will was set aside. *Per cur.*—This is a dispute between co-heirs, and the plaintiff can have no better right to see the deed after the will is set aside than now. Decreed the deeds to be brought into court, and plaintiff to have his costs.

Vide 1 *Eq. Abr.* 36. pl. 36.
 2 *Com. Dig. Ch.* (31. 3.)

12. An order was made at the Rolls that the defendant might inspect a deed proved in the cause, and referred to by the deposition as part thereof; but Lord Chancellor discharged that order, for that the defendant before hearing ought not to see the strength of the cause, or any deed, to pick holes in it; and his lordship said, no such order in like case was ever made.

P. 1727, cor. King, C.
Sir Robert Davers v. Davers,
 2 P. Wms. 410. 2 Stra. 764.
 2 Eq. Abr. 285. pl. 3.
Vide Hodson v. Earl of Warrington, 3 P. Wms. 35. Davy v. Barber, 2 Atk. 489. Blount v. Blount, 3 Atk. 636.

13. The defendant's witness proves a deed, and refers to it in his deposition: the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition.

H. 1729, cor. King, C.
Hodson v. Lord Warrington,
 3 P. Wms. 35.
Vide Davers v. Davers, 2 P. Wms. 410.
 To this the Editor (Mr. Cox) says, *Qu. et vide* Bettison v. Farrington, 3 P. Wms. 364.

14. Bill by testator's heir at law, suggesting that his widow had all the title deeds relating to the inheritance of the lands of which testator died seised, and to which the heir claimed title. Testator's widow insisted by her answer that all the real estate was devised to her in fee. On the first hearing Lord King decreed, that, as plaintiff was heir at law, all testator's deeds should be brought before the Master, that plaintiff might inspect them (a), and have liberty to bring an ejectment, and that the defendant, as devisee, should not give in evidence any dormant term or incumbrance. Plaintiff afterwards had a re-hearing, when Lord Talbot affirmed Lord King's decree, though he thought it but a slight equity for an heir to say he wants writings, when his title as heir stands in need of none, unless he claims under some deed of entail concealed by the widow or executor.

T. 1734, cor. Talbot, C.
 On a rehearing from a decree of Lord King.
Tanner v. Wife, 3 P. Wms. 295.
 2 Eq. Abr. 304. pl. 27.
Ca. temp. Talb. 284.
S. C. nomine Tanner v. Morfe.

(a) *Vide* Earl of Suffolk v. Howard, 2 P. Wms. 177. Bettison v. Farrington, 3 P. Wms. 363.

15. Lands in *co-parcenary* descended upon A. and B. A. died about eight months after, before any receipt of rent or partition made, whereupon his widow brought a bill against B. (*et al.*), charging, that defendants had got possession of all the title deeds, whereby she was disabled to sue for dower at law, and therefore prayed to have dower assigned her in equity of what lands descended to her husband. Defendants demurred, because dower is a right merely at law, and triable by a jury, and that no impediment was suggested why she could not recover there; and insisted, that for detainer of dower, damages were to be assessed by a jury, and that she was not entitled to the possession of the deeds, but that they belonged to the defendants. But Lord Chancellor over-ruled the demurrer, saying, that in this case,

T. 1735, cor. Talbot, C.
Moore v. Black,
Ca. temp. Talb. 126.
 2 Eq. Abr. 389. pl. 19.
 In this case, the estate being in *co-parcenary*, and no partition made, the sheriff could, upon a recovery in a writ of dower, put her in possession but of a third of an undivided moiety; and that recourse must be had to this court for a certainty, and to set out part to her. The judgment in dower not reducing it to more certainty than it was before, according to 1 Inst. 346. *Dist. arg.*

ease, *A. dying before receipt of rent or partition made, she could not prove a seisin at law to entitle herself to dower, without the assistance of the deeds; and that, as A.'s estate was complicated, she must come into equity for a partition, otherwise she must (after judgment and execution) at the end of every six months be driven to her action against such as held jointly with her, and who received the profits, for her share, and also for damages for detainer, which his lordship thought absurd and unreasonable.*

T. 1735, cor. Talbot, C.
Bettison Bart. v. Farringdon & al.
3 P. Wms. 363.

The reporter (of counsel for defendants in this case) objected that the court would not assist the plaintiff in picking holes in defendants' title, nor compel them, *before bearing* to produce the deeds, and that both parties were volunteers; in which case it was not usual for the court to interpose. But Lord Chancellor said, that though both are volunteers, yet it is of some weight that the honor † of the family descended on the plaintiff, and it is for the benefit of all parties that it should be done *before the hearing*; for if the deed be a proper one to make a tenant to the *precipe* plaintiff will go no farther, and defendants, by referring to the deeds in their answer, have made them part thereof ‡. Wherefore his lordship ordered as above.

* *Vide Buden v. Dore*, 2 Vef. 445. —† *Vide Earl of Suffolk v. Howard*, 2 P. Wms. 178.

‡ *Qy.* Whether the bare reference to a deed, without setting it forth in *bac verba*, will make it part of the answer? *Et vide Hodson v. Earl of Warrington*, 3 P. Wms. 34.

H. 1745, cor. Hardw. C.
Aston v. Aston, 3 Atk. 302.

17. A motion was made on behalf of *Hervey Aston* against *Lady Aston*, to deliver up one part of her marriage settlement, she admitting she had two.

She had her own part in her custody, and became possessed of the other as executrix to her husband, which part he had indorsed as his own.

Lord Chancellor directed the settlement to be produced before the clerk in court, but would not order it to be delivered up on motion, that being the very end of the bill.

His lordship compared this to the case of a purchaser, who, if he denies notice, need only set forth the purchase deed, and plead his purchase in bar to a discovery of the title deeds.

There is no occasion to offer to confirm *Lady A.'s* title to the jointure (a), for both parties claim under the same deed, and because it must appear what their title is before it can be confirmed; but that will not extend to a precedent title deed where the person had a precedent estate tail.

(a) *Vide Chamberlain v. Knapp*, 1 Atk. 52. and the cases cited in a note thereto.

A joint-

§ 5. *Production—Inspection, &c.*

D—e 585

A jointress and a purchaser ought to produce their deeds, that it may be seen whether the lands they claim are comprised therein

18. A remainder-man in tail, or a reversioner in fee, may go into equity to have the title deeds secured for his benefit, though an estate for life is standing out.

14 July 1746, cor. Hardw. C.
Smith v. Cooke, 3 Atk. 382.
Vide Ivie v. Ivie, 1 Atk. 431.
Pyncent v. Pyncent, 3 Atk. 571.

19. A jointress will not be obliged to bring her jointure deed into court, or before the Master, unless the party requiring it will confirm her jointure (a); but the court will direct her only to deliver in a schedule of the deeds, that the court may order what shall or shall not be produced.

20 May 1747, cor. Hardw. C.
Petre v. Petre, 3 Atk. 511.

Senhouse v. Earl, 2 Vef. 450. *Ford v. Piesing*, 1 Vef. jun. 76.

(a) *Vide Chamberlain v. Knapp*, 1 Atk. 52. Lord Portsmouth v. Lady Effingham, 1 Vef. 430.
Leach v. Trollope, 2 Vef. 662.
Pyncent v. Pyncent, 3 Atk. 571.

20. A son, a remainder-man in tail, under a settlement made by a grandfather, in which the father is tenant for life, without impeachment of waste, prefers a bill to have the title deeds brought into court. Lord *Hardwicke* refused to direct it, and said some third person, and secure place agreed upon by the parties, would be a much more proper depository than a Master.

24 Oct. 1747, cor. Hardw. C.
Pyncent v. Pyncent, 3 Atk. 571.
Lord Chancellor said, the court is not much inclined to deposit family title deeds in the hands of a Master, lest they be lost.

His lordship said, that the relief prayed was the first of the kind he ever saw; such applications have been made against a jointress; and, on the remainder-man agreeing to confirm her jointure, the court have done it (b); or where a remainder-man has been a stranger to the tenant for life, it may have been done, but not in such an instance as this (c).

(b) *Petrie v. Petrie*, 3 Atk. 511.

(c) *Ivie v. Ivie*, 1 Atk. 431.
Smith v. Cook, 3 Atk. 382.

21. When the heir at law, by his answer to a bill brought to establish a will, admits it to be duly executed, and to the purport set forth, saying at the close of it, that he is the heir at law of the testator, this is not sufficient to entitle him to the inspection of the deeds and writings belonging to the estate; besides, in this case the heir does not so much as point out which deeds he wants to inspect, nor the substance of them, which he might do, though not in his custody.

26 July 1749, cor. Hardw. C.
Potter v. Potter, 3 Atk. 719.
1 Vef. 274. *Ambt.* 98.

22. An heir, before he has established his title at law, may go into equity to remove terms out of the way which would prevent his recovering at law, as also for the production and inspection of deeds and writings.

31 July 1751, cor. Hardw. C.
Harrison & Ux. v. Southcote and another, 1 Atk. 546.

23. The

22 July 1752, cor. Hardw. C.
Euden v. Dore, 2 *Ves* 445.

23. The bill set out a title, and that certain old terms were outstanding; defendant did not plead, but by answer set up a title inconsistent with the plaintiff's. *Per Lord Chancellor*—Plaintiff cannot by a fishing bill pray a discovery of the deeds of defendant's title. If there was any charge in the bill, general or special, that defendant had in his power the deeds and writings of the plaintiff's title, an answer must be given to such bill.

27 Jan. 1753, cor. Hardw. C.
Leman v. Alie,
 1 *Eq. Abr.* 125. *Ambl.* 163.
Vide Shales v. Barington, 1 P.
 Wms. 481.

24. Plaintiff, who was disinherited, brought his bill to have inspection of deeds and writings; but not appearing to have any title, defendant moved that the bill should be dismissed with costs. *Per Lord Chancellor*—If an heir at law brings a bill for such a discovery, there is no pretence that he shall pay costs. Bill dismissed without costs, with liberty for defendant to apply for costs, if plaintiff should molest him.

M. 1789, cor. Thurlow, C.
Ford v. Peering,
 1 *Ves. jun.* 72.

25. Upon a bill by an heir at law for discovering and delivering up, or depositing title deeds, against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the curtesy, plaintiff need not state every link of his pedigree.

22 July 1796, cor. Loughb. C.
Strose v. Blackburne,
 2 *Ves. jun.* 222.

26. Bill by a tenant for life in possession, for a discovery and delivery of the title deeds. Plea, a mortgage in fee by a former tenant for life, alleging himself to be seised in fee without notice. Ordered to stand for an answer, with liberty to except.

A mortgagee of the unsettled part of an estate must discover the boundaries, and the title deeds are incident to the possession under the freehold title.

A pawnee of a bailee must discover so as to enable the owner to bring an action.

See more of the Deposit of Deeds for Inspection, *ante*, sec. 1.

Of the Inrolment of Deeds, *vide Inrolment*.

Of the due Execution of a Deed, *vide Evidence—Witness*.

For the Nature, Operation, and Effect of Deeds of Feoffment, Bargain and Sale, and Gift, see *Touchst.* by *Hilliard*, and the numerous Authorities there referred to.

See more respecting Deeds, *ante*, tit. *Condition—Consideration—Covenant—et post*, tit. *Estate—Fine—Grant—Landlord and Tenant—Marriage—Parent and Child—Portions—Recovery—Release—Use—Warranty—Will*.

Demise Le Roy.

D—e

Maxims and Rules.

In Anglia non est Interregnum.

THE law ascribes to the king, in his political capacity, an absolute immortality; for immediately upon the decease of the reigning prince, in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *dimissio regis vel coronæ*; an expression which signifies merely a transfer of property; for, when we say the *demise of the crown*, we mean only, that in consequence of the disunion between the king's body natural from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. 1 *Black. Com.* 249. *Plowd.* 177. 234.

How far the Demise of the Crown shall affect the ordinary Procefs of the Court.

1. BY the king's demise (*a*), all procefs of contempt not executed is determined, so that the plaintiff must begin again at an attachment; but where any procefs is executed, and a *cepi corpus* returned, the procefs stands good.

"issuing out of any court of equity shall be discontinued by the death of her majesty or any king or queen."

2. An attachment sued out in the time of King Charles II., and executed at *Exeter*, three days after

H. 1684, Canc.

Ann. 1 *Vern.* 300.

(a) *Sed vide stat.* 1 *Ann.* c. 8. s. 5. whereby this matter is now put out of dispute, it being by that act provided (*int. al.*) "That no commission or proceeding

P. 1686, cor. Jeffries, C.

Burch v. Moypowder,

1 *Vern.* 400.

after his demise, before notice of his death, was adjudged to be well executed, and the proceedings thereon regular.

T. 1733, cor. King, C.
Thompson's case, 3 P. Wms. 196.
 2 Eg. Abr. 419. pl. 6.

(a) *Crew v. Vernon*, Cro.
 Car. 97.

3. A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which in strictness the suit abated; but the witnesses were examined before notice of his death. Upon reference, the Master reported that the depositions were regularly taken, though one of the witnesses was yet living; and the Master grounded his opinion on a case (a) where, upon a commission to examine witnesses, some were examined after the demise of the crown, but before notice of it. Held, that such witnesses would have been indictable for perjury, had they sworn false. In the principle, Lord Chancellor said, the Master's report was judicious, and held the depositions to be regularly taken.



THE END OF THE SECOND VOLUME.

